Supreme Court, U.S.
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**In the**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1999

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Andrew E. Blanche, Jr. and
Cynthia D. Blanche,
*Petitioners*

V.

United States of America,
William S. Hewitt, and
First Nationwide Mortgage Corporation,
*Respondents*.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether petitioners' appeal of a lower court decision negating their property interest is rendered moot by a subsequent foreclosure, or other sale, of the property.

2. Whether I.R.C. § 6323 requires application of the law of subrogation when a court negates the assumption or purchase of property after a good-faith buyer (reasonably believing the buyer purchased an interest in property and assumed the seller's underlying debt) made payments on that debt.

3. Whether I.R.C. § 6323 applies automatically, without further inquiry, if a buyer establishes that the buyer held at least one of the qualifying property interests and obtained equitable and legal title under local law, before the United States properly filed a tax lien.

4. Whether an interest that is created by a written executory or completed contract and qualifies as a "purchaser" interest within the meaning or I.R.C. § 6323(h)(6), may be converted into a nonqualifying lien or security interest by virtue of the seller's unilateral repudiation or rescission (either explicit or implied by law) of the contract.

5. Whether the United States can legally seize property not subject to its lien, cause the property to be sold by the Government's acts or omissions, and not compensate the innocent owners for their property loss.

## LIST OF PARTIES
(BEFORE THE COURT)

| NAME AND *CONNECTION* | INTEREST |
|---|---|
| **Andrew E. Blanche, Jr.,** *Petitioner* | Claims 100% ownership of property the Internal Revenue Service (United States) sued to foreclose against to satisfy the Hewitts' tax liability. |
| **Cynthia D. Blanche,** *Petitioner* | Spouse of Mr. Blanche and has same interest as Mr. Blanche. |
| **United States of America,** *Respondent* | Sued to foreclose a federal tax lien against the Hewitts on property involved in a contract and related deed between the Blanches and the Hewitts. |
| **William S. Hewitt,** *Respondent* | Delinquent taxpayer who cross-claimed that he did not transfer his 50% interest in the property to the Blanches. |
| **Peggy Hewitt,** *Non- party to appeal* | Delinquent taxpayer and spouse of William Hewitt who signed a contract, assumption agreement and deed transferring property to the Blanches. |
| **First Nationwide Mortgage Corporation,** *Non-party to appeal* | Successor to first lien mortgage holder, Lomas Mortgage, USA. Foreclosed on property when United States decided against a tax sale. The Blanches claim subrogation to their mortgage. |

## LIST OF PARTIES
(IN THE PROCEEDINGS BELOW)

| NAME AND *CONNECTION* | INTEREST |
|---|---|
| **Andrew E. Blanche, Jr.**, *Defendant-Cross Claimant-Counter Claimant-Appellant* | Claims 100% ownership of property the Internal Revenue Service (United States) sued to foreclose against to satisfy the Hewitts' tax liability. |
| **Cynthia D. Blanche**, *Defendant-Cross Claimant-Counter Claimant-Appellant* | Spouse of Mr. Blanche, same interest as Mr. Blanche |
| **United States of America**, *Plaintiff-Appellee* | Sued to foreclose a federal tax lien against the Hewitts on property involved in a contract and related deed between the Blanches and the Hewitts. |
| **William S. Hewitt**, *Defendant-Cross Defendant-Appellee* | Delinquent taxpayer; cross-claimed that he did not transfer his half-interest in the property. |
| **Peggy Hewitt**, *Non-party to suit Non- party to appeal* | Spouse of William Hewitt, signed contract, assumption agreement and deed transferring property to the Blanches. |
| **Lomas Mortgage, U.S.A.**, *Defendant under suit Non-party to appeal.* | Held first lien on property; filed bankruptcy before trial; transferred mortgage to First Nationwide Mortgage before district court rendered its decision. |
| **Hank Wilson**, *Defendant under suit Non-party to appeal* | Held mechanic's lien against property. Court entered a default judgment against him. |

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Andrew E. Blanche, Jr. and Cynthia D. Blanche respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, A1-A3) is reported at 169 F.3d 956. The opinion of the district court (App. B, *infra*, B1-B23) is reported at 79 A.F.T.R.2d (RIA) 1557.

## JURISDICTION

The court of appeals entered its judgment on March 12, 1999 (App. A, *infra*, A1-A3). The court of appeals denied a timely petition for rehearing on June 11, 1999 (App. C, *infra*, C1-C2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

The Internal Revenue Code (26 U.S.C.) § 6323 provides that a federal tax lien is not valid against any purchaser of property until proper notice is filed by the United States. I.R.C. § 6323(h)(6) states that an executory contract or option contract to lease or purchase property that meets the criteria given qualifies a person as a "purchaser" under I.R.C. § 6323. (App. F).

## STATEMENT

The United States sued to foreclose a tax lien against certain real property[1] they believed was owned 50% by Respondent William S. Hewitt ("Hewitt"). The United States joined Petitioners, Lomas Mortgage U.S.A. ("Lomas"), and Hank Wilson as parties with recorded interests or liens against Foxbriar.

Lomas (who held a mortgage lien against Foxbriar) answered and requested that, alternatively to the United States foreclosing its tax lien, Lomas be allowed to foreclose its mortgage lien against Foxbriar. Lomas filed Chapter 11 bankruptcy before trial.

Hewitt answered admitting he held a 50% interest in Foxbriar. Hewitt cross-claimed against Petitioners for back rental payments, saying he was one-half owner during a period Petitioners occupied Foxbriar without his consent. Hewitt asserted a conspiracy claim against Petitioners and Lomas.

Petitioners, a husband and wife, claimed 100% ownership of Foxbriar under a lease option/earnest money contract signed by William S. and Peggy L. Hewitt (husband and wife) and a related assumption agreement and deed, executed by Peggy Hewitt and filed in the county records; all of which arose before the United States filed its tax lien.

Petitioners cross-claimed against Hewitt for specific performance of their sales contract and to quiet title to Foxbriar because of the defect created when Hewitt was unavailable to sign the deed.

The option contract required Hewitt to make particular repairs to the property and Petitioners to make certain payments. Even though Petitioners made all the payments as required, Hewitt never made the repairs either during or after the option period as the parties agreed and never attempted to do so because he was living in Tacoma, Washington. After the option period,

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[1] 3325 Foxbriar Lane, Cibolo, Guadalupe County, Texas ("Foxbriar")

Petitioners agreed to continue the payments under the option terms and try to work something out with the Hewitts about completing the sale.

A dispute arose between Petitioners and Hewitt because his failure to make the repairs impeded Petitioners' efforts to obtain financing to complete the sale. Hewitt further aggravated the situation when he left his wife, Peggy, in September 1991 and did not contact Petitioners to let them know how to reach him. Peggy told Petitioners she did not know how to contact Hewitt. Petitioners never heard from Hewitt about Foxbriar until he filed his answer. Hewitt never contacted Lomas to ensure the mortgage was current.

Meanwhile, Petitioners continued making payments to Peggy. Peggy and Petitioners entered negotiations to complete the sale of Foxbriar.[2] During these negotiations and unbeknownst to Petitioners, Hewitt and Peggy did not pay the mortgage and Lomas commenced foreclosure action. To avoid losing their home, Petitioners agreed (with Peggy Hewitt) to cure the mortgage default, accept the property "as is", forgo the repairs, assume the mortgage and all liabilities against Foxbriar, and apply the earnest money paid, and, thus, complete the purchase of Foxbriar. This agreement was executed and a deed signed and recorded in August 1992. Following Peggy's instructions, Petitioners sent copies for Hewitt's signature but Petitioners never heard from him.

In September 1992, Peggy told Hewitt about the completed sale and Hewitt saw the deed in the county records. However, Hewitt never contacted Petitioners or Lomas to protest against the transaction. Hewitt told the United States that he owned 50% of the property and thus the United States sued.

Lomas filed Chapter 11 bankruptcy before the case went to trial. After trial but before the district court's decision, Lomas sold or transferred the Foxbriar mortgage to Respondent First

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[2] Petitioners originally agreed to accept Foxbriar "as is" and waive the repairs, assume the mortgage and all other liabilities against Foxbriar, apply the earnest money already paid of $9,600 and give the Hewitts a note for $20,000. However, the foreclosure of the mortgage impeded this arrangement.

Nationwide Mortgage Corporation ("First Nationwide").[3] The case went to trial March 6, 1996, and the district court issued its findings of facts and conclusions of law and judgment on February 28, 1997.

In his opinion and orders, the district court judge:

1) held that Petitioners had no interest in Foxbriar when the federal tax lien was filed and never owned Foxbriar;
2) denied Petitioners' claim for specific performance;
3) granted the United States a judgment against Hewitt for his tax liability plus accruals;
4) granted Petitioners a judgment for repairs and improvements to Foxbriar;
5) held that the federal tax lien against Foxbriar was valid and could be foreclosed;
6) held that any foreclosure proceeds should be distributed
   a) first to Lomas for any outstanding mortgage,
   b) second to Petitioners as restitution for curing the mortgage default and for improvements made to Foxbriar,
   c) third to the United States for Hewitt's unpaid tax liability, and
   d) fourth to the Hewitts as owners of Foxbriar; and
6) transferred Hewitt's conspiracy cross-claim to the bankruptcy court.

During the eleven months between the trial and the district court's decision, the Foxbriar mortgage transferred from Lomas to First Nationwide. From August 1992 forward, Petitioners continued the monthly mortgage payments to Lomas and then First Nationwide. Petitioners paid for necessary repairs to Foxbriar during the years after their assumption of the mortgage.

Petitioners filed a Motion for Reconsideration and a motion to stay the judgment. The United States opposed the stay

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[3] The Court of Appeals opinion erroneously shows this as the Federal National Mortgage Association.

claiming it was important to sell the property immediately.[4] The judge granted the stay then lifted it when he denied the motion for reconsideration.

Petitioners filed a timely notice of appeal. The issue on appeal was that Petitioners were purchasers under I.R.C. § 6323(h)(6) from May 1990 forward; they were the equitable and legal owners and Hewitt held no interest in Foxbriar when the United States filed its lien. Therefore, in conformity with I.R.C. § 6323, the federal tax lien never attached to Foxbriar and the United States' suit to foreclose was wrongful.

Alternatively, Petitioners argued that, under Texas law, at a minimum they held 50% of the legal title to Foxbriar and, therefore, United States v. Rodgers[5], controlled. Furthermore, Petitioners claimed that even if the Court of Appeals sustained the District Court, I.R.C. § 6323(i)(2) required that Texas subrogation laws be applied in determining Petitioners' rights regarding mortgage payments made to Lomas and First Nationwide. Petitioners argued the District Court erred in refusing to apply the Texas law of subrogation.

Petitioners requested a stay of judgment pending appeal, however, the United States vigorously opposed the stay and the district court denied it. Petitioners then requested a stay pending appeal from the Court of Appeals. Again, the United States opposed the stay, asserting the need to sell Foxbriar quickly to avoid waste and devaluation.

The Court of Appeals denied Petitioners a stay but gave the United States a caveat. The Court of Appeals said that, if the United States lost on appeal, the government would be held to their concession to pay Petitioners the value of their interest in Foxbriar and the United States was judicially estopped from denying such payment.[6] In June 1997, First Nationwide informed Petitioners that First Nationwide was named a party defendant in the suit and would do what was necessary to protect their mortgage.

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[4] See note 14, *infra*.

[5] 461 U.S. 677 (1983).

[6] See App. D, *infra*.

During the five months from the judgment and denial of rehearing, Petitioners made mortgage payments through the July 1997 payment. Contrary to the district court order, First Nationwide continued to treat Petitioners as liable for the Foxbriar mortgage and pursued collection of the mortgage against Petitioners, rather than the Hewitts. In August 1997, First Nationwide started filing negative credit information against Petitioners showing delinquent mortgage payments and liability for the Foxbriar mortgage.

First Nationwide systematically sent Petitioners collections letters, called them, and reported the delinquency to the Veterans Administration. In October 1997, the United States, First Nationwide, and Mr. Blanche discussed the sale of Foxbriar because the Hewitts were not paying the mortgage. The United States said they would sell the property by close of December 1997. First Nationwide said that, if the United States did not hold its sale by then, First Nationwide would foreclose its lien.

Petitioners filed for a rehearing that was denied August 15, 1997. After receiving the judicial estoppel, the United States reassessed their position and decided they should not sell Foxbriar after all. The United States did not inform the court or Petitioners of this drastic change in position. While the appeal went forward, Hewitt did not pay the mortgage and the United States did not foreclose. Hewitt filed for Chapter 7 bankruptcy in April 1998 and received a discharge in August 1998, which discharged the taxes that were the basis of the United States' suit.

First Nationwide continued to pursue collection against Petitioners and not the Hewitts. Because of the damage this created to Petitioners' financial position and credit worthiness, in June 1998, Petitioners filed a motion with the District Court to issue a writ of execution to the United States to sell Foxbriar. The District court denied this motion.

The case was briefed and argued. In their brief and reply brief, Petitioners asserted that (1) they did not breach either contract; (1) their 100% ownership, (2) Hewitt waived his right to rescind the contract and was estopped from rescinding the

contract and deed after accepting the benefits,[7] and (3) and Petitioners were entitled to attorney fees pursuant to I.R.C. § 7430. Alternatively, Petitioners averred that (1) they had a minimum 50% ownership, (2) the Government should pay them the value of their 50% interest under United States v. Rodgers, (3) their should be subrogated to Lomas's/First Nationwide's mortgage, (4) the lower court should have awarded them their earnest money paid to the Hewitts, and (5) they should be paid interest on the judgment.

Petitioners declared they qualified as "purchasers" under I.R.C. § 6323 because they held uninterrupted equitable and legal title to 100% of Foxbriar before IRS filed its tax lien. Petitioners evinced this through a factual and legal analysis that established that:

1) the option and executory contracts were separate and divisible;
2) Petitioners had a valid executory contract, signed by Hewitt, that arose when they fully performed under the option contract;
3) Hewitt breached the option and executory contracts when he never repaired the property and did not maintain the mortgage from foreclosure;
4) Mrs. Hewitt acted for the community and Hewitt consented to and ratified her actions in his answer and at the trial;
5) the assumption agreement was a modification of the original contract not a new agreement;
6) Hewitt waived his right to rescind the contract and deed and was estopped from refusing to transfer the property;
7) Even though he did not sign the assumption deed, Hewitt was bound by it when he accepted the benefits it bestowed, and it became the agreement of the parties;
8) Hewitt never properly rescinded the contract under either its terms or the Texas statutes and legal precedent; and

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[7] Benefits bestowed were earnest money received, repairs forgone, assumption of his debts against Foxbriar, no damage to his credit, mortgage, insurance, and taxes paid by Petitioners, and property repairs improvements made by Petitioners.

9) Petitioners were entitled to attorney's fees under I.R.C. § 7430, and interest.

In addition, Petitioners asserted that the district courts findings of fact were contradictory, erroneous and not supported by the record and the legal conclusions ignored relevant Texas Supreme Court case law[8], and was founded on erroneous facts and faulty analysis.[9]

Petitioners' first alternate position asserted a 50% ownership of Foxbriar because, considering items (1) through (8) above, Hewitt confirmed and consented to Peggy's transfer of at least her 50% interest in Foxbriar.[10] Based on this, Petitioners asserted that United States v. Rodgers, determined Petitioners compensation when the United States sold Foxbriar.

Petitioners' final alternate position, if the Court of Appeals fully sustained the district court on the ownership issue, reasoned that, I.R.C. § 6323(i) required that Petitioners be subrogated to First Nationwide's (Lomas's) lien to the extent of the mortgage paid. Petitioners also discussed that they were entitled to interest on the judgment.

Hewitt did not file a brief refuting any of Petitioners factual statements.[11]

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[8] The District Court complete ignored Sinclair Refining Co. v. Allbritton, 218 S.W.2d 185 (Tex. 1949), the pre-eminent case on the relationship between option and executory contracts.

[9] In his findings of fact and conclusions of law, the judge asserted that the Blanche/Hewitt contract ended on its own terms on June 30, 1991. The district court then concluded that Petitioners' contract was invalid because they breached when they did not obtain third party financing by August 31, 1991. It is illogical that Petitioners could breach the contract two (2) months after the District Court said it ended! The lower court provides no legal analysis to explain such an incongruous result.

[10] In his answer and during the trial, Hewitt asserted that Peggy Hewitt transferred her half of the property but not his half.

[11] This is significant because Hewitt was the only other party in the suit who could establish the intent of the parties during the initial transaction.

The United States argued Petitioners were not "purchasers" under I.R.C. § 6323. In their brief, the United States acknowledged that Petitioners held three of the requisite property interests outlined in I.R.C. § 6323(h)(6). The United States proposed, however, that these interests were not valid because Petitioners only held an equitable "lien" right that ended when the contract ended, and Petitioners' deed was invalid because Hewitt did not sign it.

The Court of Appeals heard oral arguments on September 2, 1998. During oral arguments, two of the circuit judges expressed the opinion that at a minimum they saw Petitioners as 50% owners of Foxbriar. Concerned that Hewitt did not sign the assumption agreement and deed, the appellate panel requested legal memoranda discussing the state of Washington rulings regarding transfers of community property by one spouse.[12] The United States sent a legal memorandum and Petitioners responded.

In October 1998, after waiting fourteen months for the United States to foreclose its tax lien, First Nationwide foreclosed its mortgage lien against Petitioners and reported it on their credit. Foxbriar was sold in December 1998 and the proceeds fully paid First Nationwide's lien with only a $10.00 excess.

In February 1999, the United States wrote the Fifth Circuit about the foreclosure sale. The Government implied that the sale made the appeal moot and promised their legal analysis of the situation would ensure. The United States asserted the sale extinguished all liens to the property and Petitioners failure to challenge the validity or superiority of the mortgage lien rendered their appeal moot. The court informed the parties it was inclined to dismiss the appeal on this basis and requested legal comment from the parties.

Petitioners filed a memorandum with the Court of Appeals arguing against dismissal because the basis of the appeal

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[12] When they signed the original contract, the Hewitts lived in Tacoma, Washington and Peggy Hewitt was in Tacoma when the assumption agreement and deed were executed. However, William Hewitt arranged for the sale of Foxbriar in Texas and he, Petitioners, and the real estate broker signed the contracts in Texas.

was that the district court erred in erasing their ownership of Foxbriar; the sale did not affect this issue. Petitioners reminded the Court that, at the start of the appeal, the Fifth Circuit anticipated the United States' foreclosure sale and argued that the foreclosure sale by First Nationwide merely substituted for that tax sale. Furthermore, Petitioners argued that the subrogation issue was a challenge to the validity and superiority of the first lien mortgage, was not moot, and should be decided.

Nevertheless, the Court of Appeals dismissed the appeal as moot for lack of a challenge to the validity of the first lien mortgage, and never reached the issues on appeal. The Fifth Circuit denied Petitioners' petition for rehearing and suggestion for rehearing *en banc* on June 11, 1999; and this petition for writ of certiorari ensues from that denial.

## REASONS FOR GRANTING THE WRIT

This conflict effects the rights of private parties to settle contractual disputes without interference from the United States government.

The Court of Appeals dismissal of Petitioners' case was arbitrary and capricious and an abuse of discretion. The Fifth Circuit's act conflicts with long standing, and recent, rulings of this Court. Moreover, the order is confoundingly devoid of any legal analysis that would elucidate the rationale for why this Supreme Court precedent is not binding in the present case and precludes a decision on the merits of the issues presented.

The United States abused its authority when it overreached I.R.C. § 6323 to collect tax. The tactics of United States counsel against Petitioners and before the lower courts was reprehensible in its underhandedness and perfidy. Dismissing Petitioners' claims sanctions these iniquitous actions of the United States. The Fifth Circuit's response to the government's abuse of authority remarks a blasé demeanor, that stands in sharp contrast to the Ninth Circuit's denouncement of the same tactics in the only other case to reach the appellate courts.

This Court decided the issue of the United States ability to seize property owned jointly by delinquent and non-delinquent taxpayers, in United States v. Rogers, 461 U.S. 677 (1983). However, the question of whether the United States can seize property from a good faith buyer by standing in for a delinquent taxpayer to rescind an executory or completed contract is new.

This case is a timely[13] and rare opportunity for this Court to provide guidance on government intrusion into private contracts.

## I. The Court Of Appeals Decision To Dismiss Conflicts With Long Standing Supreme Court Rulings.

### A. The Non-Judicial Foreclosure Sale Stood In Place Of The Tax Lien Foreclosure Sale And Effected Sale Of Foxbriar Under The District Court's Decree.

The Fifth Circuit dismissed this appeal as moot because the real property the subject of the underlying suit ("Foxbriar") was sold in a non-judicial foreclosure sale by the first lienholder. This lienholder was the same lienholder that the District Court decreed would be paid first when the United States foreclosed its lien and sold the property through a foreclosure sale. The Court of Appeals reasons that because there was no challenge to the validity of this lien, the sale renders the appeal moot. The Fifth Circuit's reasoning fails both factually and legally.

First, Petitioners did challenge First Nationwide's (Lomas') priority against their right to be subrogated for the mortgage payments they made on the Hewitts' mortgage. Petitioners raised this in their brief against dismissal. The Fifth Circuit provides no reason why this was not a challenge to validity or failed as a challenge to validity. Furthermore, the United States initiated this case to foreclose its tax lien. The United States received its order to foreclose and sell and attacked

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[13] Especially, in light of the recent Senate hearings into the Internal Revenue Service's overzealous collection practices.

Petitioners personally for seeking to stay the judgment pending appeal.[14]

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[14] The Blanches requested, and the court granted, a stay pending the court's consideration of their Motion for Reconsideration/New Trial. The United States opposed the stay and reconsideration in its Motion to Set Aside Order Granting Stay and Response to Motion for Reconsideration/New Trial. The United States cited to certain court case(s) that call for "**speedy collection of taxes**". E.g., Bull v. United States, 295 U.S. 247 (1934); United States v. National Bank of Commerce, 472 U.S. 713 (1985); and United States v. Rodgers, 461 U.S. 677 (1983). In those motions, the United States pleaded to the District Court that:

> "The United States has no way to ensure that waste does not occur with respect to the subject matter property. In this regard, the Blanches, Hewitt or some third party tenant could reduce or destroy the equity currently existing in the subject matter property either through the non-payment of mortgage payments or through the failure to maintain the property.
>
> The Blanches Motion for Reconsideration . . .serves only to **delay the inevitable while placing the United States at continued risk** that the equity in the property may be destroyed or diminished. (Emphasis added).

The United States filed a motion requesting the District Court deny Petitioners' request for stay pending appeal, arguing:

> It appears that **their** [Petitioners'] **appeal serves no purpose other than to delay the United States collection of Hewitt's long delinquent taxes**. The United States stands in a position junior to both the first lien holder and to the Blanches. **[A]ny diminution in the equity of the subject matter property during the pendency of an appeal will tend to more seriously impact the United States** . . .
>
> There is a strong public interest in the **prompt** and orderly collection of taxes. That **interest has already been considerably delayed**. The primary reason for the [government's] underlying suit was that **there was little likelihood of collecting Hewitt's tax delinquency absent a sale of the subject matter property**. (emphasis added)

Both the district court and the Fifth Circuit denied Petitioners' request for stay. These denials cleared the way for the United States to foreclose. It was reasonably foreseeable that, if the Government did not conduct its tax sale, First Nationwide would foreclose because the Hewitts were not paying the mortgage.[15] The district court reiterated that Petitioners did not own the property.[16]

When the Fifth Circuit denied stay, however, the United States received a caveat that, if the Court of Appeals decided in Petitioners' favor, the government would be held to the principle they espoused from Wildmon v. Berwick Universal Pictures[17]. Accordingly, Petitioners would be paid the fair market value of

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Finally, the United States adjured the Fifth Circuit to deny stay asserting:

> "Because they no longer reside at the property, [Petitioners] can hardly claim that they will suffer irreparable injury if the property is sold while this appeal is pending. In the event the property is sold, and [the Fifth Circuit] ultimately determines that the Blanches had an interest in the property that primed the federal tax lien, they may be made whole at that time by being paid the fair market value of their interest. (Cite omitted.) ("By definition, 'irreparable injury' is that for which compensatory damages are unsuitable".)
>
> A lien foreclosure action such as the instant case, **is one of the collection tools Congress has afforded "to ensure the prompt and certain enforcement of the tax laws"**. (Cite omitted). The Government has prevailed in this case, and **the public interest will be served by permitting the Government to sell the property sooner rather than later.** A sale of the property now will not substantially harm the Blanches because they are no longer using the property as their homestead. (emphasis added).

[15] This occurred once during the Blanche/Hewitt transaction and Petitioners' cure of the mortgage default is the only reason the property was available for the United States to assert its lien.

[16] See App. E, *infra*, E1-E2.

[17] 983 F.2d 21 (5th Cir. 1987)

their interest and the Government would be estopped to deny that payment. The United States determined that this estoppel placed them at risk and decided not to hold a tax sale.[18] The United States knew that if they did not hold the tax sale First Nationwide would foreclose its mortgage lien because the mortgage had not been paid since July 1997.[19] Thus, the sale by First Nationwide substituted for the Government's tax sale.[20]

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[18] Petitioners sent a motion to the District Court (and advisory to the Fifth Circuit) to issue a writ and compel the sell of Foxbriar because the mortgage company was reporting the delinquent debt and mortgage payments against Petitioners' credit. Counsel for the United States sent a letter to the Fifth Circuit responding to the motion stating :

> "In light of the conditions placed on the sale by the Court in its order dated July 14, 1997, resolving the stay issue, the Government subsequently determined that it was in the best interests of the parties concerned to postpone selling the property pending the Court's resolution of the Blanches' [Petitioners] appeal."

Counsel did not speak for all the parties. At that time, Hewitt was in bankruptcy and Petitioners asserted that not selling was damaging their financial status and credit. Therefore, the only interest served in delaying the sale was the Government's interest. The "condition" counsel claimed the Fifth Circuit placed on them was merely a reiteration of the United States own admission in its opposition to stay cited in note 6, *supra*.

[19] Petitioners' Letter Memorandum to the Fifth Circuit dated February 24, 1999, includes a sworn statement from Mr. Blanche detailing a telephone conversation between Mr. Blanche, Tom Herrin, Attorney for the United States, Lori Condon, First Nationwide's Support Litigation Administrator. Because Hewitt was not making mortgage payments, Ms. Condon advised that if the United States did not sell the property by end of December 1997, First Nationwide would foreclose their mortgage.

[20] This is supported by the District Court in its order denying Petitioners' Motion to Compel Deposit of Foreclosure Proceeds. The District Court "noted that its 1997 judgment gave no instructions to the mortgage company regarding how or when it was to sell the property . . . [but] the company is, of course bound by the [District] Court's decree to prioritize the proceeds as that decree directs it to do."

### B. THE COURT OF APPEALS DISMISSAL DIRECTLY CONFLICTS WITH SUPREME COURT RULINGS.

The principles ruling against dismissal of an appeal because of compliance with the lower court order are long standing. Ancient decisions of this Court clearly establish that the fact that money or property changes hands by force of a judgment or decree does not dispose of the underlying errors asserted by the defendant opposing that judgment.

In Erwin v. Lowry, 7 How. 171, 184 (12 L. Ed. 655), this Court ruled that

> . . . in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed it is the duty of the inferior court on the cause being remanded to restore the parties to their rights.

In O'Hara v. McConnell, 93 U.S. 150, 154 (1876), it was held that the making of a conveyance as ordered by the decree of the court does not deprive the defendant of the right of appeal. These principles were reiterated in Dakota County v. Glidden, 113 U.S. 222, where this Court said:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money, and a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover, if he reverses the judgment, by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court,

and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal."

Dakota County v. Glidden, 113 U.S. at 224. The Ninth, Eighth, and District of Columbia circuits followed these holdings and reversed dismissal of appeals where defendants complied with lower court orders after unsuccessful attempts or failure to obtain a stay or post a supersedeas bond to stay proceedings.[21]

A pivotal case specifically regarding the actions of the United States in carrying out its tax enforcement is Church of Scientology v. United States, 506 U.S. 9 (1992). The rationale in Scientology harmonizes with that of the older cases cited *supra*, although it does not cite these cases specifically.

Petitioners' case parallels Church of Scientology in several respects as follows. First, in both instances, the property the United States sought to obtain was in the hands of a third party. The district court had the tapes in Scientology[22] and Petitioners held possession of Foxbriar.

Second, in both instances, the United States invoked the District Court's jurisdiction under I.R.C.[23] § 7403[24]. In the present, case the United States invokes its authority to file suit under I.R.C. § 7403 to enforce a lien (Doc. 1 at 1),[25] while in Scientology it invoked the authority of I.R.C. § 7604 to enforce a

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[21] See, Josevig-Kennecott Copper Co. v. Howarth Co., 261 F. 567, 568-569 (9th Cir. 1919); Cramer v. Phoenix Life Ins. Co., 91 F.2d 141, 145 (8th Cir. 1937); and Holcomb v. Holcomb, 209 F.2d 794, 797 (D.C. Cir. 1954).

[22] Church of Scientology, 506 U.S. at 448-449.

[23] Refers to Internal Revenue Code of 1986, as amended (26 U.S.C.) and cited by its popular abbreviation "I.R.C."

[24] Church of Scientology, 506 U.S. at 449.

[25] United States of America's Complaint. All references to the record are to the document numbers in the District Court's file unless otherwise stated.

summons.[26] Also, in both instances, the owner of the property opposed the United States motion to enforce.

Third, the District Court divested Petitioners of title to Foxbriar and entered an order enforcing the tax lien and allowing a sell of the property to collect taxes, just as the District Court entered an order enforcing the summons.[27]

Fourth, Petitioners appealed the District Court's decision stripping them of ownership of Foxbriar, similar to the Church of Scientology appealing the district court's decision to remove them of possession of their tapes. Both Petitioners were denied stay of judgment and had their property removed from their control pending appeal.[28]

Finally, the Government argued that when the lower court compelled the Church to comply with its summons and the Church complied, the controversy on appeal ceased to exist. Similarly, in her letter to the Fifth Circuit dated February 10, 1999, counsel for the United States says that that foreclosure of the property effectively settled the claims in the property and renders Petitioners appeal moot.

This Court disagreed with the Government's rationale in Scientology for why the appeal was moot. This Court said:

> While a court may not be able to return the parties to the status quo ante . . . a court can fashion some form of meaningful relief in circumstances such as these. Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that

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[26] Church of Scientology, 506 U.S. at 449.

[27] Ibid.

[28] The United States in the present case, however, did not act on the right to foreclose but delegated this to First Nationwide. Clearly based on the District Court's order Denying Deposit of Foreclosure Proceeds, the mortgage foreclosure sale was in accord with the judgment.

> interest is violated and a court can effectuate relief by ordering the Government to return the records. . .. There is nothing in the statute to suggest that Congress sought to preclude appellate review of district court enforcement orders. To the contrary, we have expressly held that IRS summons enforcement orders are subject to appellate review.

Church of Scientology, 506 U.S. at 450-451. This rule is relevant to seizure of real property to enforce federal tax liens and should apply in that context.[29]

In a per curiam opinion, the Supreme Court clearly and succinctly restates the "Scientology rule" in Calderon v. Moore, 518 U.S. 149, holding:

> . . .[A]n appeal should therefore be dismissed as moot when by virtue of an intervening event, a Court of Appeals cannot grant "any effectual relief whatever" in favor of the appellant.[30] The available remedy, however, does not need to be "fully satisfactory" to avoid mootness. To the contrary, even the availability of a "partial remedy," is sufficient to prevent [a] case from being moot."

Calderon v. Moore, 518 U.S. at 150. In the denial of stay, the Court of Appeals provided Petitioners with an alternate remedy in lieu of return of Foxbriar. The judicial estoppel was in keeping with the precedent proscribed above and the Court of Appeals should be held to that. The Fifth Circuit gives no reason why the foreclosure sale precludes a decision on the merits that the District Court's decision that Petitioners were not purchasers under I.R.C. § 6323 was erroneous. Also, in their brief

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[29] Maybe even more so because, usually, seized records are returned. In contrast, the intent of lien enforcement is to dispose of the property beyond the reach of the owner from whom it was seized.

[30] Citing to Mills v. Green, 159 U.S. 651 (1895).

opposing dismissal, Petitioners gave a list of possible relief including, subrogation to the mortgage company for the mortgage paid, and 50% ownership of Foxbriar and application of United States v. Rodgers.[31]

The fact that the foreclosure sale was conducted by First Nationwide is of no consequence because the result was the foreclosure and sale of Foxbriar that the United States requested.[32] The United States action in refusing to hold the tax sale necessitated the sale by First Nationwide. For the United States to circumvent Petitioners appeal through a sale that is the direct result of its judgment is unthinkable and a misuse of the justice system and is a direct conflict with the directives of this Court.

The Court of Appeals decision is erroneous because dismisses an appeal where some relief is available. Because this conflicts with the Supreme Court's crystal-clear holdings, the Court should grant certiorari to review this important issue.

## II. The Court of Appeals Interpretation of I.R.C. § 6323 Conflicts with the Ninth Circuit's Interpretation.

The Ninth Circuit faced the same issue[33] in Newnham v. United States, 813 F.2d 1384 (9th Cir. 1987). The Fifth Circuit

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[31] 461 U.S. 677 (1983).

[32] Based on the Government's letter dated June 19, 1998, one could infer that the United States "got what they asked for" and did not like it.

[33] There exist important contrasts between Newnham and the present case that make the government's actions and the District Court and Fifth Circuit rulings even more harmful to an innocent party in a private contract dispute with a delinquent taxpayer.

In Newnham, Patricia Newnham executed a contract and the seller sought to repudiate before the sale was complete. Newnham sued for specific performance and filed a *lis pendens* before the Government filed its tax lien. During the pendency of Newnham's case, the IRS

recorded tax liens against the repudiating seller and issued a levy to seize the property. Shortly after, Newnham received specific performance under a court-ordered settlement but the United States insisted on the validity of its lien and refused to release it. Newnham sued to effect release of the lien and enjoin the government from holding its tax sale. The government asserted that the seller's repudiation of the contract before they filed the tax lien effectively gave Newnham only a lien interest in the property. The District Court's analysis in Newnham turned on whether or not she had a lien interest as opposed to a possessory interest.

The situation in the present case is more complex and even more compelling for the proposition that I.R.C. § 6323 prevented the government's intrusion into Petitioners contract. Petitioners had a lease option contract to purchase the property not just an executory contract. **The lease option required both the buyer and seller to perform**; the buyer to pay money and **the seller to make repairs to the property to Petitioners' satisfaction**. (App. G, *infra*, G11). It is undisputed on the record that Petitioners made all the required payments and exercised their option to purchase the property in accords with the contract. While the District Court rejected Petitioners arguments that failure of Hewitt to make the repairs hampered their efforts to obtain financing to complete the sale, the undisputed evidence in the record shows that Hewitt never made the repairs during the option period and Petitioners did not prevent him from making the repairs. After the option period, the parties orally agreed that Petitioners would continue monthly payments while the Hewitts arranged to make the repairs. Before this could be finalized, Hewitt left his wife and never contacted Petitioners about the contract. Then the Hewitts allowed the property to be foreclosed a second time in May 1992. To protect their interest in the property Petitioners and Mrs. Hewitt modified the contract to so Petitioners could assume the property "as is" and all its liabilities and pay the mortgage default. An agreement and deed were executed that included Hewitt's name and filed in the county deed records in August 1992 approximately, 17 months before the IRS filed its tax lien. Hewitt discovered the transaction in September 1992 but never came forward to protest. It is significant that unlike the buyer in Newnham, Hewitt never attempted to rescind the contract or invalidate the deed before the United States sued to collect his delinquent taxes. Therefore, at the time the government filed its tax lien the contract was complete and no longer executory.

is only the second circuit to consider the issues in this case. These two circuits contrast sharply in their assessment of and response to the United States untenable actions under the circumstances.

In Newnham, the Ninth Circuit held that:

> "Newnham's interest in property the Government's seized was protected by the plain language of the relevant Internal Revenue statutes. The Ninth Circuit rejected the government's contention that the seller's repudiation of the executory contract deprived Newnham of her status as a purchaser. Section 6323 specifically states that Newnham's interest under her written executory contract qualified as a purchaser's interest provided that the other statutory conditions were met.
>
> The statute does not mention the possibility that a qualifying interest in property created by a written executory contract to purchase may be converted into a nonqualifying lien or security interest by virtue of the seller's unilateral repudiation of the contract. The government's argument has no statutory basis; and it is equally failing in logic, for an executory contract does not become less so by one party's default. It makes no sense for the government to claim a windfall against the nondefaulting purchaser simply because a delinquent taxpayer renounces a contractual obligation.

The Ninth Circuit was astonished by the United States' unreasonable, yet persistent contentions that Newnham held a lien interest. The Ninth Circuit reversed the dismissal by the lower court and awarded Newnham her attorney fees because of "the government's unreasonable, yet astonishingly persistent contentions in this litigation."

The Fifth Circuit effectively rejected the Ninth Circuit's holding when its dismissed Petitioners case as moot. Especially, when there existed an articulated remedy for Petitioners if the decision was in their favor. The pivotal issue presented by Petitioners was that the District Courts facts and law was erroneous. Thus, the Fifth Circuit's "opinion" states that the foreclosure sale cut off all liens. Clearly, the Fifth Circuit accepts the argument that Hewitt's eleventh hour disagreement with the assumption agreement and deed[34] converted Petitioners' executory and completed contract into a lien against the property that was junior to the tax lien.

Circuit Judge Kozinski, in a separate concurring opinion, eloquently expressed the Ninth Circuit's abhorrence of the government's persistence in pursuing its lien in the face of the clear meaning of the statute invalidating it, as follows:

> I write separately to express my personal disappointment with the government lawyers who pursued this matter on behalf of the United States. Appellant here is not the taxpayer; whatever tax problems the property's former owners had were not of her making.
>
> There are times when statutes, particularly those involving the collection of revenue, can work serious hardships. No one can blame government lawyers for pressing their client's rights under such circumstances. It is a wholly different matter, however, for government lawyers to ignore or bend the words of Congress in pursuit of an unconscionable result. To inflict the expense and uncertainty of litigation on citizens on such a tenuous basis is conduct unbecoming public servants and officers of the court. I can only hope that this matter will be brought to the personal attention of the Assistant Attorney General for the Tax Division, the United States Attorney for the Central District of California and the Chief Counsel of the Internal Revenue Service so that

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[34] Hewitt finally conveyed this to Petitioners in his answer in June 1995, about three years after he discovered the existence of the deed.

they may each take appropriate steps to avoid such overzealousness by their subordinates.

The Assistant Attorney General for the Tax Division, the United States Attorney for the Western District of Texas, and the Chief Counsel for the Internal Revenue Service are the same offices that have brought the present litigation. The Fifth Circuit sends them the opposite message, however, that it is okay to ignore the clear and plain meaning of I.R.C. § 6323, and invidious tactics by public servants and officers of the court are okay.[35] It is

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[35] When the United States filed its suit to foreclose, they believed Petitioners held a one-half interest in the property. The Government cited that this Court's opinion in United States v. Rodgers, 461 U.S. 677, clearly allowed them to seize the property and pay Petitioners the value of their one-half interest. In their quest to oppose stay and sell the property immediately, counsel for the United States attacked Petitioners personally (see note 14, *supra*). Counsel for the United States made representations to both the District Court and Court of Appeals that the property would be sold and should be sold immediately (see note 14, *supra*). Counsel for the United States assured the Fifth Circuit that the remedy of payment of the value of their interest in the property would be available to Petitioners if the Fifth Circuit ruled in their favor. The turning point was the judicial estoppel placed by the Fifth Circuit. As early as October 1997 the United States expected to sell the property (see note 18, *supra*).

Then the United States decided to wait, an action in direct contrast to its impassioned pleas for swift collection of the taxes and to sell now and immediately. The United States had direct knowledge that First Nationwide would eventually foreclose. (See note 18, *supra*). In their answer, Lomas (the first lienholder) had even requested permission to foreclose its mortgage lien in lieu of the tax sale. Furthermore, counsel for the government knew that the judgment required the first lienholder to distribute any sales proceeds in accordance with the decree the same as the government was. Consequently, it was unscrupulous for counsel for the United States to imply that the sale by First Nationwide settled all appeal claims simply because there was no challenge to the validity or superiority of the first lienholder. Considering the hodge-podge of erroneous facts and questionable legal authority and analysis advanced by the Government in support of the District Court's decision, if the government had any persuasive authority justifying their conclusion,

inconceivable that the Fifth Circuit is not similarly astounded like the Ninth Circuit at the mercurial nature and tactics of counsel for the government when they create a situation to their own detriment. Such an apathetic attitude is dangerous to citizens trying to litigate against a government with unlimited resources.

The decision below is diametrically opposed to that of the Ninth Circuit. The Court should grant certiorari to review this import conflict.

### III. The Questions Presented are Important

In its brief, the United States, acknowledges that

1. Petitioners executed a lease contract with the Hewitts in May 1990, that qualified as a "lease of property" within the meaning of I.R.C. § 6323(h)(6)(A),

2. Petitioners' option contained in the lease agreement, and also executed in May 1990, constituted an option to purchase within the meaning of I.R.C. § 6323(h)(6)(C), and

3. Petitioners' earnest money contract constituted an executory contract to purchase money within the meaning of I.R.C. § 6323(h)(6).

If these interests qualify under I.R.C. § 6323, then, by definition, they were valid against subsequent purchasers under local law and gave Petitioners the status of "purchasers". The United States inquiry would end and Petitioners, by these admissions, had interests that precluded attachment of the tax lien to Foxbriar.

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surely they would have provided it. Rather, the United States proposes this dubious legal theory in a letter to the Fifth Circuit promising supporting authority. To Petitioners' detriment and the government's gain, however, the promised authority never materialized.

To circumvent the plain meaning of the statute however, the Government, states that Petitioners did not claim under the contracts (directly contrary to Petitioners' own statements under oath and on brief) and the best that the valid contracts gave them was some "equitable right".

Though faced with statutory language contrary to its position, the United States goes beyond this language to make Petitioners interest something it never was. The Newnham Court categorically rejects such analysis as a gross overstepping of the plain meaning of I.R.C. § 6323 and its definition of a "purchaser" for purposes of the statute. The Fifth Circuit takes the directly opposite approach accepting the Government's argument that the valid interests held by petitioners were merely lien interests because Hewitt's negation of the contract terminated any contractual interests.[36] Such a result essentially amounts to the United States seizing property without just compensation to innocent parties with valid interest.[37]

In sum, the two circuits considering the question are so diametrically opposed in their interpretation that parties to private contractual disputes cannot ascertain if the Internal Revenue Service can enter their dispute, remove what should be a matter for state court decision into a purely federal realm, and, thereby circumvent the requirement of Section 6323 that local law determine the validity of the interest.

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[36] Evidence of acceptance of this theory this comes from the Fifth Circuit's Order Denying Stay (App. D, *infra*) that discusses if "[Petitioners] had an interest. . . senior to the federal tax lien. In addition, the Dismissal only speaks of challenges to lien validity. (App. A, *infra*, A3). By inference, the Fifth Circuit rejects the theory that Petitioners acquired a property interest that extirpated the tax lien as to Foxbriar.

[37] A result that this Court declared would pose significant difficulties under the Due Process Clause of the Fifth Amendment to the United States Constitution. See, United States v. Rodgers, 461 U.S. at 697.

This case presents the unique issue[38] of whether the United States can go beyond the inquiry of Section 6323 to change a qualifying interest in property created by a written executory contract (or completed contract) into a nonqualifying lien or security interest by virtue of the sellers unilateral repudiation or rescission of the contract.

The Ninth Circuit unequivocally says no; the Fifth Circuit off-handedly implies yes. This case presents a rare opportunity for this Court to address the disputed issue and bring much needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Cynthia D. Blanche
Andrew E. Blanche, Jr.
2011 Campbell Parkway
Richardson, TX 75082-4849
(972) 699-8807
*Petitioners*

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[38] And the many concurrent sub-issues relative to percent of ownership, proper damages, attorney fees under I.R.C. § 7430, right to interest on a judgment, and right of subrogation consistent with I.R.C. § 6323.

UNITED STATES OF AMERICA,
Plaintiff - Counter Defendant - Appellee,
V.
ANDREW E. BLANCHE, ET AL., Defendants,

ANDREW E. BLANCHE; CYNTHIA D. BLANCHE,
Defendants - Cross Claimants - Counter Plaintiffs - Appellants,
V.
WILLIAM S. HEWITT,
Defendant - Cross Defendant - Appellee.

No. 97-50482

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

169 F.3d 956; 1999 U.S. App. LEXIS 4018;
83 A.F.T.R.2d (RIA) 1486

**March 12, 1999, Decided**

SUBSEQUENT HISTORY: Rehearing and Rehearing En Banc Denied June 11, 1999, Reported at: 1999 U.S. App. LEXIS 16702.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Texas. SA-95-CV-419. Edward C Prado, US District Judge.

DISPOSITION: DISMISSED appeal as moot.

CORE TERMS: tax lien, first mortgage

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Counter Defendant - Appellee: William S Estabrook, Washington, DC. Sarah Kay Knutson, US Department of Justice, Washington, DC.

For ANDREW E BLANCHE, Defendant - Cross Claimant - Appellant: Cynthia D Blanche, Richardson, TX.

CYNTHIA D BLANCHE, Pro se, Defendant - Cross Claimant - Appellant, Richardson, TX.

For WILLIAM S HEWITT, Defendant - Cross Defendant - Appellee: Gregory Wayne Canfield, San Antonio, TX.

JUDGES: Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

OPINION:
[*956] BY THE COURT:

This appeal raises for our determination the validity of the district court's determination that the United States, through the Internal Revenue Service, had a tax lien against the following described property:

Lot Number One (1), Block Number One (1), NORTHCLIFF COUNTRY CLUB [*957] ESTATES COMMUNITY, SECTION 1, a subdivision in Guadalupe County, Texas, according to plat recorded in Volume 4, Pages 63-65, Plat Records, Guadalupe County, Texas.

The district court determined that such tax lien was valid in the amount of $25,276.20 and ordered the foreclosure of such tax lien and the distribution of the proceeds from the sale of the property as described in the final Judgment of the district court filed on February 28, 1997.

This Court has now been advised that during the pendency of this appeal, the Federal National Mortgage Association[1] as holder

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[1] Sale was actually made by First Nationwide Mortgage Corporation ("First Nationwide"), successor to Lomas Mortgage, U.S.A.

of the first mortgage note on the above described property has exercised its power of sale under the deed of trust securing such note; and the substitute trustee [**2] under the first deed of trust has sold such property to third parties at a foreclosure sale on December 1, 1998.

No party to this appeal has raised any issue as to the validity of the first mortgage lien; and the foreclosure of such lien effectively moots the issues of this appeal.

Accordingly, we DISMISS this appeal as moot.

UNITED STATES OF AMERICA, Plaintiff,
VS.
ANDREW E. BLANCHE, CYNTHIA D. BLANCHE, WILLIAM S. HEWITT, HANK WILSON, and LOMAS MORTGAGE, U.S.A.,
Defendants.

CIVIL ACTION NO. SA-95-CA-0419

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

1997 U.S. Dist. LEXIS 3122; 97-1 U.S. Tax Cas. (CCH) P50,448; 79 A.F.T.R.2d (RIA) 1557

**February 28, 1997, FILED**

CORE TERMS: repair, earnest money, tax lien, conveyance, financing, lease, spouse, mortgage, deed, convey, specific performance, restitution, purchaser, estoppel, community property, default, dollars, roof, one-half, inspection, unknown, expired, assumption agreement, unpaid tax, reimbursed, addendum, expended, monthly, consented, undivided

COUNSEL: [*1] For USA, plaintiff: Thomas M. Herrin, Dept. of Justice, Dallas, TX.

For ANDREW E. BLANCHE, defendant: Randall Palmer, III, Attorney at Law, San Antonio, TX. For CYNTHIA D. BLANCHE, defendant: Randall Palmer, III, (See above). For WILLIAM S. HEWITT, defendant: Gregory W. Canfield, Law Offices of Gregory Canfield, San Antonio, TX. For LOMAS MORTGAGE, U.S.A., defendant: Jackie Oliver, Dallas, TX.

For ANDREW E. BLANCHE, cross-claimant: Randall Palmer, III, Attorney at Law, San Antonio, TX. For CYNTHIA D. BLANCHE, cross-claimant: Randall Palmer, III, (See above).

For ANDREW E. BLANCHE, counter-plaintiff: Randall Palmer, III, Attorney at Law, San Antonio, TX. For CYNTHIA D. BLANCHE, counter-plaintiff: Randall Palmer, III, (See above).

For USA, counter-defendant: Thomas M. Herrin, Dept. of Justice, Dallas, TX.
For WILLIAM S. HEWITT, cross-claimant: Gregory W. Canfield, Law Offices of Gregory Canfield, San Antonio, TX.

For ANDREW E. BLANCHE, cross-defendant: Randall Palmer, III, Attorney at Law, San Antonio, TX. For CYNTHIA D. BLANCHE, cross-defendant: Randall Palmer, III, (See above).

JUDGES: EDWARD C. PRADO, UNITED STATES DISTRICT JUDGE

OPINIONBY: EDWARD C. PRADO

OPINION: [*2]

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On March 5, 1996, a trial before the bench was held in the above-styled and numbered cause. The case comes to this Court pursuant to the Internal Revenue Code of 1986, as amended, 26 U.S.C. §§ 7402, 7403 and 28 U.S.C. §§ 1340, 1345.

Plaintiff United States (hereinafter "IRS") seeks to reduce to judgment a federal income tax assessment against Defendant William S. Hewitt (Hewitt), to foreclose a federal tax lien on certain real property, and to receive a judgment for any unpaid tax liability not satisfied by the sale of the property at issue. Defendants Andrew E. and Cynthia D. Blanche (the Blanches) filed a counter-claim against Hewitt for specific performance under a failed contract for sale of the property. Hewitt filed a cross-claim against Lomas Mortgage U.S.A. and the Blanches

alleging a conspiracy to deprive him of his property and seeking back rental payments for the Blanches' occupancy.

Immediately prior to trial, the Court was informed that Lomas Mortgage U.S.A. had filed for bankruptcy. No representative of Lomas appeared at trial. Consequently, Hewitt's conspiracy claim against Lomas and the Blanches was severed by the [*3] Court prior to trial.

Pursuant to Federal Rules of Civil Procedure 52(a) and 58, the Court hereby enters the following findings of fact and conclusions of law.

## FINDINGS OF FACT

The evidence submitted to the Court in this trial shows as follows:

(1) On May 27, 1991, the IRS assessed a federal income tax liability against Defendant William S. Hewitt for the 1990 tax year. As of March 1, 1996, this tax liability totaled $25,276.20, and continues to accrue interest and penalties until paid.

(2) At the time of the tax liability assessment, Hewitt and his wife, Peggy L. Hewitt, were the owners of certain real property described as:

Lot Number One (1), Block Number One (1), NORTHCLIFF COUNTRY CLUB ESTATES COMMUNITY, SECTION 1, a subdivision in Guadalupe County, Texas, according to plat recorded in Volume 4, Pages 63-65, Plat Records, Guadalupe County, Texas.

(hereafter referred to as "the property"). The IRS filed a tax lien on the property on January 18, 1994, in Guadalupe County, Texas.

(3) On May 20, 1990, prior to the filing of the tax lien, the Hewitts entered into an earnest money contract to sell the property to the Blanches.

(4) Pursuant to the terms of a lease [*4] option addendum in the Earnest Money Contract, the Blanches began occupying the property on June 25, 1990, as lessees. The lease option in the earnest money contract called for monthly payments of $1000.00 for a period of one year beginning July 1, 1990 through June 30, 1991. A portion of that payment, $250.00 per month, would be credited back to the Blanches at the end of the option, to be applied to the purchase of the property.

(5) The purchase price of the property at the end of the contract period was $139,500.00 minus the credit back of $3,000.00. In addition to the monthly lease payments, the contract called for the Blanches to tender earnest money of $100.00 with the initial contract, $2,500.00 on July 1, 1990, and $1,500.00 on January 1, 1991. The earnest money contract further required the Blanches to secure outside financing for the purchase of the property.

(6) A standard inspection report on the property completed on June 19, 1990, by SIDCO Inspection Service, revealed several needed repairs, including structural problems with the roof. This report did not include inspection of structural damage to the pool.

(7) All the payments required under the contract were [*5] made by the Blanches, however, they did not purchase the property on the closing date of August 31, 1991.

(8) The earnest money contract, including the lease option, expired by its own terms on June 30, 1991. Thereafter, the Blanches remained in possession of the property and continued to make $1000.00 monthly 'lease' payments.

(9) The Blanches did not complete their purchase of the property because they believed that the Hewitts first needed to

make repairs to the property in order to bring it up to code. Based on conversations with their broker, it was the Blanches' belief that the property did not meet city inspection codes.

(10) The Blanches spoke to two or three mortgage companies. They were told that it would be impossible for them to secure financing if the property failed to meet city codes. Based on what their broker told them, the Blanches decided it would be a waste of money to actually put in an application for financing before the repairs were done. Because no application was made, the Blanches were never given or denied financing.

(11) Hewitt testified that he was unable to make most of the repairs because he was living outside of the state. Hewitt argued that even [*6] if he failed to make the repairs as required under the contract, the Blanches could have made the repairs and they would have been reimbursed or, alternatively, they could have opted out of the contract in light of the alleged cost to repair the property. Nonetheless, Hewitt stated that he spoke with Mr. Blanche a number of times after receiving correspondence n1 from him regarding the repairs in question and instructed Mr. Blanche to either send him estimates or make the repairs and he would reimburse for the cost.

n1 A letter dated January 3, 1991, addressed to Mr. and Mrs. Hewitt in Tacoma, Washington, was submitted into evidence detailing the findings of the inspection report dated June 19, 1990. Exhibit H. In addition, a letter dated June 4, 1991 from Mr. Blanche to Hewitt expressed concern about the needed repairs to be done before the Blanches could secure outside financing to purchase the property. Defendant's Exhibit D1-18.

(12) Hewitt maintained that most of the needed repairs were minor except for [*7] the roof, which Allstate Insurance Company replaced in May of 1991. There is a factual dispute about the condition of the roof following these repairs. The Blanches say that Allstate only replaced damaged shingles and did nothing about the structural problems. Hewitt says he was

assured by the roofer that the roof was in good shape after the repairs and contends that his obligation was satisfied. No inspection was done after the Allstate repairs were complete.

(13) The terms of the earnest money contract did not require Hewitt to make repairs unless or until he was in "receipt of all loan approvals and inspection reports." n2 The Blanches proceeded as if all the repairs found on the inspection report were to be made by the Hewitts regardless of loan approval.

n2 Paragraph 7B of earnest money contract.

(14) According to the earnest money contract, repairs exceeding $1,500.00 would not be covered by the Hewitts. n3 The addendum to the contract repeats two of the contract provisions. The addendum specifies that [*8] a licensed inspector would inspect the property and that the Hewitts would be responsible for making repairs based on that inspection. There is nothing in the addendum to indicate that the $1500.00 repair limit in the main body of the contract would not apply to the repairs found by the inspection. The addendum merely states that once the Hewitts' obligations are satisfied, all other repairs would be up to the Blanches. The roof, in a special provision, had an additional warranty expiring June 6, 1991.

n3 The Blanches expended approximately $969.00 on plumbing repairs prior to the lease option expiration date, which falls below this $1,500.00 limitation.

(15) The Blanches insist that the Hewitts were obligated to make all the repairs listed by the inspection report, notwithstanding the $1500.00 contract limitation. Further, the Blanches appear to have believed that all repairs were to be made before the Blanches had an obligation to apply for third-party financing. These contentions are disputed by Hewitt [*9] and are not consistent with the language of the contract itself.

(16) The Blanches have never tendered the full contract price for the property and do not do so now. Mr. Blanche testified that with all the repairs and improvements that have been made, he believes enough money has been expended. However, the Court notes that at least some of the money went to accommodate the Blanches' desire for improvements to the property, not merely repair or replacement.

(17) The Blanches continued making the monthly lease payment of $1000.00 to the Hewitts after the earnest money contract and lease option expired. n4 As of September 1991, the checks were made payable only to Peggy L. Hewitt by her instructions; n5 the last payment being made on April 10, 1992.

n4 There was a conversation sometime after June 30, 1991, between Hewitt and Mr. Blanche. Mr. Blanche was upset at Hewitt because he still had not made the repairs to the property as promised. Mr. Blanche became even more infuriated because Hewitt told him that he was thinking of putting the property up for sale.

n5 Mr. Blanche relied on information he received from Mrs. Hewitt indicating that Mr. Hewitt had left her, she did not know his whereabouts, and the lease payments were to be made in her name only.

[*10]

(18) During the time the Blanches were making the checks payable to Mrs. Hewitt, they discussed with her the possibility of purchasing the property by taking the property as is, assuming the outstanding mortgage, and giving her a $20,000 note in addition to the earnest money they already paid. However, once Lomas Mortgage U.S.A. began foreclosure proceedings, sometime in the early spring of 1992, the Blanches and Mrs. Hewitt agreed to different terms. In consideration for the assumption agreement, the Blanches were to take the property as is, assume the unpaid mortgage balance of $59,703.43 and any

other encumbrances on the property, cure the default with the mortgage company of $7,269.73, and apply the earnest money given under the contract that had previously expired.

(19) The Blanches were concerned they would not have good title to the property without Hewitt's signature. On May 8, 1992, the Blanches sent a letter to Mrs. Hewitt explaining the need for power of attorney from Hewitt to convey the property. At this point, the Blanches did not know whether the Hewitts had divorced, separated, or even if Mrs. Hewitt was in contact with her husband.

(20) Once the assumption agreement [*11] and deed were drafted they were sent via facsimile to Mrs. Hewitt in Tacoma, Washington, to be signed by both her and Hewitt. When they were returned via facsimile to the Blanches, the only signature on the documents was that of Mrs. Hewitt. The documents were notarized July 2, 1992, as the date the assumption deed and assumption agreement were executed by Mrs. Hewitt.

(21) After receiving the documents from Mrs. Hewitt, the Blanches had a conversation with her that led them to believe she had received approval from her husband regarding the conveyance of the property. n6 Believing that Hewitt had consented to the sale, the Blanches sent the assumption deed and agreement back to Mrs. Hewitt so she could have Hewitt sign them. However, the Blanches never heard back from Mrs. Hewitt regarding when Hewitt would sign the papers. The Blanches were obviously still concerned that Hewitt's signature was not on the documents. Consistent with this concern, a letter sent by Mrs. Blanche to Mrs. Hewitt on September 20, 1992, reiterated the need for Hewitt's signature on the documents.

- n6 The Court sustained an objection to hearsay testimony about what Mrs. Hewitt said her husband told her. This Court cannot presume what was actually said or not said by Mrs. Hewitt or Hewitt but must consider only what was allegedly relied or not relied upon by the Blanches. The Blanches obviously

were under the impression that by assuming and curing the mortgage default on the property they were not only getting a good deal, they were also preventing the house from being foreclosed upon. However unreasonable they may have been, the Blanches believed Hewitt gave his consent to the assumption in order to prevent the imminent foreclosure of the property. However, the Court will not make such a finding because the only evidentiary support for this assertion is inadmissible hearsay testimony.

[*12]

(22) After Lomas Mortgage U.S.A. instituted foreclosure proceedings, the Blanches were able to assume the loan on the property by curing the default amount. The Blanches filed the assumption deed, still unsigned by Hewitt, with the County Clerk of Guadalupe County, Texas on August 24, 1992. Thereafter. the Blanches began to take steps to repair and improve the property, all the while believing they were the true owners of the subject property.

(23) The repairs and/or improvements of items made to the property by the Blanches, in addition to the $969.00 expended prior to the expiration of the Lease Option, include the following:

2/25/94: Extensive work on the in-ground pool by Gary Pools to repair structural damage, install hot tub, and replace various inoperative items totaling $15,650.00;

3/14/94: Yard clearing by Richard Bosquez for a total of $293.50;

4/15/94: Water heater replacement by Mr. Rooter Plumbing totaling $3186.08;

1/26/95: Privacy Fence installation by Arrowhead Fence & Supply Co., Inc. totaling $637.00;

Date unknown: Electrical work by unknown company for $580.00;

Date unknown: Heating and [*13] air conditioning work by unknown company for $600.00;

Date unknown: Garage door & opener work by unknown company for $750.00.

There are additional itemized costs/expenditures submitted by the Blanches n7; however, the evidence is unclear whether these additional costs were merely projections or had been undertaken at the time of trial. These costs include heating and air conditioning repairs for $2500.00, roof repairs for $7500.00, fence repairs for $2000.00 dollars, and ceiling and other consequential damage repairs stemming from the roof damage for $2500.00.

- n7 Defendant's Exhibit no. D1-17

(24) Hewitt testified that he and Mrs. Hewitt purchased the property by way of assumption using combined funds in June of 1988. They lived in the home for approximately one year before they moved and rented the property out. Hewitt stated that he has no intention of returning to live and claim the property as his homestead.

(25) Hewitt testified that he never ratified or consented to the assumption [*14] of the property by the Blanches. There is no admissible evidence to contradict this statement. While the Court, as finder of fact, is entitled to disbelieve Hewitt's testimony, other evidence leads the Court to believe that Mrs. Hewitt, in fact, attempted to convey the property without her husband's consent.

(26) Hewitt separated from his wife in August of 1991 but he says that Mrs. Hewitt knew how to contact him at any time. However, he admits that there was no contact between himself

and Mrs. Hewitt between May 1992 and September 1992. He testified that he first found out about the foreclosure proceedings in a conversation with his wife in September of 1992, after she had already made the attempted conveyance of the property. He does not admit to approving or ratifying the sale at that time. Subsequently, he found out about the assumption by the Blanches from the recorded deed at the Guadalupe County courthouse.

(27) Any findings of fact above should be construed as conclusions of law to the extent necessary.

## CONCLUSIONS OF LAW

(1) The income tax assessment against William S. Hewitt is correct and should be reduced to judgment.

(2) The IRS tax lien is valid and attaches to the [*15] property in question. However, the lien may be ineffective as to the Blanches if they qualify as "purchasers" under 26 U.S.C. § 6323(a). A "purchaser" is:

. . . a person who, for adequate and full consideration in money or money's worth, acquires an interest . . . in property which is valid under local law against subsequent purchasers without actual notice . . .

26 U.S.C. § 6323(h)(6).

(3) If the Blanches have a valid interest in the property, that interest attached at the time of the assumption deed and the later filing of the tax lien is ineffective as to that interest. 26 U.S.C. § 6323.

(4) As an initial matter, the question of what rights and/or interests the Blanches have in the property must first be determined under applicable Texas law before federal law can be used to impose and enforce a tax lien on the property at issue. See Medaris v. United States, 884 F.2d 832, 833 (5th Cir. 1989);

26 U.S.C. § 6323(a)(interests must be determined under local law).

(5) There are no homestead claims to the property. Hewitt unequivocally stated that he has no intention of returning to live and claim the homestead exemption guaranteed under the Texas Constitution [*16] Art. XVI § 50. See e.g., Sims v. Beeson, 545 S.W.2d 262, 263 (Tex.Civ.App.--Tyler 1976, writ ref'd n.r.e.); Prince v. North State Bank of Amarillo, 484 S.W.2d 405, 409 (Tex.Civ.App.--Amarillo 1972, writ ref'd n.r.e.)(following well-settled law in Texas that in order to have abandonment of a homestead right owner must not occupy and intend to claim as homestead).

(6) The Hewitts acquired the property during their marriage using combined funds; therefore, it must be characterized as joint-managed community property under Texas law. See Tex. Fam. Code §§ 5.01(b), 5.22(c). Section 5.22(c) provides in relevant part that the community property ". . . is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement (emphasis added)." In the instant case, there is no admissible evidence to show that Hewitt gave any consent or authorization to Mrs. Hewitt, either in writing or orally, which would allow her to control or dispose of the property at any time either before or after the attempted conveyance of the assumption deed to the Blanches.

(7) Because it is clear [*17] under Tex. Fam. Code § 5.22(c) that Mrs. Hewitt alone could not convey the entire property, the next issue presented is whether Mrs. Hewitt conveyed her undivided, one-half interest in this joint-managed, non-homestead community property by entering into an assumption agreement and assumption deed to convey the property to the Blanches. n8

n8 The IRS states that it is unaware of any law that would allow for such a conveyance; however, it would nonetheless

allow a partial conveyance to stand and concede the Blanches' one-half ownership of the property.

(8) The Texas courts of appeals are split on whether one spouse may convey his or her undivided interest in joint-managed community property to a third person without first obtaining the other spouse's consent. Compare Vallone v. Miller, 663 S.W.2d 97, 98-99 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.)(holding conveyance invalid only because the instrument purported to convey entire interest not just one-half undivided interest held by [*18] spouse); n9 Williams v. Portland State Bank, 514 S.W.2d 124, 127 (Tex.Civ.App.--Beaumont 1974, writ dism'd)(finding that §§ 5.22 & 5.24 of the Texas Family Code do not foreclose one spouse from encumbering his or her one-half, undivided community property interest without first receiving consent from the other spouse) with Dalton v. Don J. Jackson, Inc., 691 S.W.2d 765, 768 (Tex. App.--Austin 1985, no writ)(declining to follow rule that would allow for one spouse to "unilaterally effect a partition of joint management community property").

n9 In fact, although Vallone would apparently allow a partial conveyance in some circumstances, Vallone would invalidate the assumption deed in the instant case because it purports to convey the entire property, not just Mrs. Hewitt's one-half interest.

(9) In light of the fact that the Texas Supreme Court has not yet spoken on this issue, this Court finds the better rule in accordance with Texas law to be that from the Dalton court. As Dalton [*19] points out, § 5.22(c) of the Texas Family Code is very specific in its language concerning the disposition of joint management community property. Dalton, 691 S.W.2d at 767 and commentaries cited therein. Section 5.22(c) unequivocally states that the property must be managed, controlled and disposed of jointly unless there is written or some other authorization by either spouse to do otherwise. Furthermore, there are both constitutional and statutory procedures that must be followed to partition a community property interest, which would be

circumvented if a partial conveyance by one spouse were allowed under the law. See Tex. Const. Art. XVI § 15; Tex. Fam. Code § 5.54; Dalton, 691 S.W.2d at 768. Accordingly, this Court finds that the attempted conveyance of the entire property by Mrs. Hewitt did not transfer her one-half, undivided interest to the Blanches.

(10) Alternately, the Blanches contend that Mrs. Hewitt could convey not only her interest but that of her husband because under unusual circumstances, such as abandonment, Mrs. Hewitt could manage, control and dispose of the community property as she saw fit. Tex. Fam. Code § 5.25. This argument, however, does [*20] not lend itself to the facts of this case. Hewitt gave uncontradicted testimony to the effect that although he did not speak to his wife for a period of time, she still knew how to contact him. Assuming, without deciding, that Hewitt abandoned his wife, Mrs. Hewitt did not comply with the statutory procedures of § 5.25 that would have entitled her to the sole management, control and disposition of the community property under Texas law. Id. The Court has not found nor has it been cited any other authority under which Mrs. Hewitt would have the right to convey the property without her husband's consent solely on the basis of abandonment.

(11) The Blanches argue that they are entitled to specific performance in light of Hewitt's failure to meet his obligations under the earnest money contract. The earnest money contract is unambiguous on its face. The contract gives the Blanches the option of leasing before the closing date of August 31, 1991, not an option to buy. The plain meaning of the contract binds the Hewitts to sell and the Blanches to buy by the closing date. This is evidenced by the terms of the agreement requiring that in the event of default on the buyer's part, the [*21] seller can either sue for specific performance or take earnest money as liquidated damages. Texas law is clear that a contract for sale exists when the buyer has both these remedies. See, e.g., Gala Homes, Inc. v Fritz, 393 S.W.2d 409, 410 (Tex.Civ.App.--Waco 1965, writ ref'd n.r.e.)(citing to Paramount Fire Ins. Co v. Aetna, 163 Tex.

250, 253, 353 S.W.2d 841, 843 (Tex. 1962) and Moss v. Wren, 102 Tex. 567, 570, 113 S.W. 739 (Tex. 1909)); Tabor v. Ragle, 526 S.W.2d 670, 675 (Tex.Civ.App. --Ft. Worth 1975, writ ref'd n.r.e.); Broady v. Mitchell, 572 S.W.2d 36, 40 (Tex.Civ.App.--Houston [1st Dist.] 1978, writ ref'd n.r.e.).

(12) Although the Blanches had the remedy of specific performance under the initial earnest money contract, they forfeited that right when they did not meet their end of the bargain to secure outside financing to purchase the property. See Cowman v. Allen Monuments, Inc, 500 S.W.2d 223, 226 (Tex.Civ.App.--Texarkana 1973, no writ)(ruling that a party who has materially breached the contract by failing to meet contract requirement cannot claim specific performance)(recognized in Hudson v. Wakefield, 645 S.W.2d 427, [*22] 430 (Tex. 1983)). Although the Blanches argue that outside financing was unavailable, the Blanches merely approached certain mortgage companies and decided not to apply based on their belief that the property would not meet city codes. The Court has insufficient evidence on which to find that the Blanches were prevented from obtaining financing by Hewitt's failure to repair. Thus, the Court finds that the Blanches are not entitled to specific performance on the contract for sale of the property.

(13) Further, as previously discussed, the Blanches have never offered to perform their part of the earnest money contract by tendering the contract price. The Blanches are not entitled to specific performance where they are not willing to abide by the terms of the contract they seek to enforce. n10

n10 In fact, the Court finds that the Blanches seek specific performance, not of the initial earnest money contract, but of the subsequent assumption agreement to which Hewitt himself was not a party. Specific performance for a subsequent contract cannot be based upon a party's default under a prior expired contract.

[*23]

(14) The Blanches also appear to allege in the alternative that they should be granted specific performance because Hewitt refused to recognize their option to purchase the property by way of the assumption deed and agreement. This contention fails for two reasons. First, even assuming the initial agreement was an option contract rather than a contract for sale, the contract failed or expired by its own terms on June 30, 1991, and therefore had no continuing effect on the subsequent agreement between the Blanches and Mrs. Hewitt. Second, assuming the contract could be construed to allow the Blanches the option of purchasing, as opposed to leasing, and that option could have been extended past the expiration date of June 30, 1991, the Blanches would still have failed to strictly adhere to the conditions of the option under the contract by failing to securing outside financing or otherwise tendering the contract price by the 'option' date. See Scott v. Vandor, 671 S.W.2d 79, 84 (Tex.Civ.App.--Houston [1st. Dist.] 1984, writ ref'd n.r.e)(applying rule that option can only be accepted if purchaser complies with terms of the agreement). Thus the Court finds that the Blanches [*24] are not entitled to specific performance of the contract as an option contract.

(15) The Blanches also make a vague claim of estoppel alleging that the IRS, through the Hewitts, is estopped from denying them title to the property because the Blanches detrimentally relied on the earnest money contract to give them title to the property. In order to assert equitable estoppel, the party raising this defense must prove all of the following elements: (1) a false representation or concealment of material facts (2) made with knowledge, actual or constructive, of those facts, (3) with the intention that it should be acted on, (4) to a party without knowledge, or the means of acquiring knowledge of those facts, (5) who detrimentally relied upon the misrepresentation. Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709, 717 (Tex. App.--Houston [14th Dist.] 1996, writ dism'd by agr.)(citing Schroeder v. Texas Iron Works, 813 S.W.2d 483, 489 (Tex. 1991)).

(16) The Blanches' estoppel argument fails because there is no evidence in the record that Hewitt falsely represented to the Blanches that they were the owners of the property or that he concealed material facts leading the [*25] Blanches to believe that they had acquired title to the property. See Barfield v. Howard M. Smith Co., 426 S.W.2d 834, 838 (Tex. 1968)(finding that failure to prove one or more of elements is fatal); see also Heckler v. Community Health Serv., 467 U.S. 51, 59-60, 81 L. Ed. 2d 42, 104 S. Ct. 2218 (1984)(at minimum, elements of estoppel must be proven). On the contrary, the evidence supports a finding that the Blanches knew there were problems in their dealings with Hewitt early on, evidenced by their admission of Hewitt's comment that he was thinking of putting the property up for sale in the summer of 1991 and their admitted failure to make sure that Hewitt consented to the assumption. Barfield, 426 S.W.2d at 838 (party must use due diligence to ascertain the truth of matters upon which they rely). Moreover, if the Blanches relied on the contract to give them equitable title to the property, their reliance was misplaced and unreasonable since they did not fulfill the terms of the contract by obtaining or seeking to obtain outside financing nor did they tender the full purchase price. See Heckler, 467 U.S. at 59 (using the defense of equitable estoppel requires [*26] a reasonable reliance in addition to a change of position which makes the party worse off).

(17) The Blanches also claim estoppel because the Hewitts knew and did not object to the investments and valuable improvements made to the property by the Blanches. Estoppel by silence maybe a valid defense in cases where one party leads another to act by the first party's silence; however, there must be a fiduciary duty or a confidential relationship which gives rise to a duty to speak. Barfield, 426 S.W.2d at 838; Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d at 719.

(18) The evidence in this case does not support a claim of estoppel by silence. First, there is no evidence that Hewitt induced the Blanches by his silence to make improvements or

investments to the property, nor is there evidence that Hewitt knew such improvements or investments were being made. Second, no confidential or fiduciary relationship exists in this case that would warrant such a claim. These parties were dealing at arms length as purchaser and seller. Therefore, this Court finds no support for the Blanches' claim of estoppel.

(19) Since this Court finds the property has not been conveyed nor may specific [*27] performance be compelled, the Blanches fail as "purchasers" pursuant to 26 U.S.C. § 6323. Under Texas law, the Blanches have no valid interest in the property which would have attached before the tax lien was filed.

(20) The Blanches also raise vague affirmative defenses of laches and waiver against the IRS. The Blanches assert that the IRS waited too long to file its tax lien on the property. This contention is not applicable in the context of this case. The tax lien arises at the time of the assessment. The lien is only notice. The Tax Code itself provides a kind of laches protection for persons who acquire an interest in property before the notice provided by a tax lien is filed. Those persons receive protection as "purchasers." Here, however, the Blanches did not acquire any interest in the property. The doctrine of laches does not provide them with any interest in the property. Similarly, waiver does not give rise to rights that never existed. The conveyance of the property was invalid and any delay by the IRS is irrelevant to the question of whether the Blanches acquired an interest in the property.

(21) Finally, this Court finds that the doctrine of unjust enrichment should [*28] be applied in this case. It would be unconscionable to allow Hewitt to keep his interest in the property as well as the substantial benefits conferred to him by the Blanches. The purpose of restitution under this remedy is to do what justice demands. See generally, RESTATEMENT OF RESTITUTION, Introductory Matters p.11 (1937). This theory of recovery provides that "[a] person who has been unjustly enriched at the expense of another is required to make restitution

to the other." RESTATEMENT OF RESTITUTION § 1. The doctrine places the person conferring the benefit back to the position he or she formerly occupied by reimbursing him or her for the benefit conferred on another. Id. at 12. Although restitution is given when one "...wrongfully secure[s] a benefit or has passively received one which would be unconscionable for him to retain," Barrett v. Ferrell, 550 S.W.2d 138, 143 (Tex.Civ.App.--Tyler 1977, writ ref'd n.r.e.), the remedy does not depend on whether the person receiving the benefit committed a wrongful act. Fun Time Centers, Inc. V. Continental Nat'l Bank, 517 S.W.2d 877, 884 (Tex.Civ.App.--Tyler 1974, writ ref'd n.r.e.). Recovery under principles [*29] of unjust enrichment is also appropriate when an agreement is "...unenforceable, impossible, not fully performed, thwarted by mutual mistake or void for other legal reasons." Harker Heights v. Sun Meadows Land, Ltd, 830 S.W.2d 313, 319 (Tex. App.--Austin 1992, no writ).

(22) The Court cannot find, based upon the minimal admissible evidence presented at trial, that the Blanches were reasonable in relying on the assumption deed combined with the representations from Mrs. Hewitt indicating that her husband consented to the conveyance. However, the Court finds that the Blanches honestly and with good faith believed that they were actually purchasing the property by assumption. The Blanches expended a great deal of money in fixing the property and making improvements in order to provide a comfortable and safe home for themselves and their children. In addition, the Blanches prevented this property from being foreclosed upon while Hewitt passively let the situation develop. In the name of equity and fundamental fairness, this Court, pursuant to Fed. R. Civ. P. 54(c), holds that the Blanches must be recompensed for the expenditures and improvements to the property that were done [*30] in reliance upon the assumption agreement and which have been duly pled in this action.

(23) As to the amounts that should not be reimbursed to the Blanches, the money expended as payments under the earnest

money contract are not recompensable since the Blanches failed to meet their obligations under the sales agreement. The Blanches did not confer a benefit, nor was Hewitt unjustly enriched, by the payments under the contract since the Blanches had a contractual duty to pay under the contract in order to purchase the property and there was a possibility that those monies would be forfeit if the Blanches did not meet their other contractual obligations. Further, the itemized expenses listed in Defendant's Exhibit D1-17 that are mere projections are not to be reimbursed. Finally, the Court finds that the monthly payments to Mrs. Hewitt and to Lomas Mortgage U.S.A. constitute fair rental value for the Blanches' occupancy of the property after the expiration of the earnest money contract and during the time they believed they were assuming the property and will not be reimbursed.

(24) As to amounts that should be reimbursed to the Blanches, the amount that they expended to cure the [*31] mortgage default is recoverable since this expenditure was in addition to the fair market paid lease payments. Additionally, amounts spent to repair and improve the property constitute an unfair enrichment of Hewitt as he will retain title to the property with its now enhanced value. Thus, the Court finds that the Blanches should recover for the following:

$969.00 (plumbing repair)

$7,269.73 (Lomas Mortgage to cure default)

$15,650.00 (Pool improvements/repairs)

$293.50 (yard clearing/cleaning)

$3,186.08 (water heater replacement)

$637.00 (fence repair/replacement)

$580.00 (electrical repair)

$600.00 (Heating and air conditioning work)

$750.00 (Garage door repair)

Totaling: $29,935.31

(25) The Court further finds that the Blanches' reimbursement should take priority over the IRS's tax lien because the Blanches' expenditures were made prior to the notice filing of the tax lien.

(26) Any conclusions of law above should be construed as findings of fact to the extent necessary.

It is therefore ORDERED that JUDGMENT shall issue as follows:

(a) the United States shall have judgment against Defendant William S. Hewitt [*32] in the amount of twenty five thousand two hundred seventy six and 20/100 dollars ($25,276.20) along with additional interest and penalties accrued since March 1, 1996;

(b) the tax lien of the United States upon the property described in this Order and based upon the amount of the judgment awarded against William S. Hewitt above is valid and may be foreclosed with proceeds to be distributed as follows:

(i) first, to Lomas Mortgage, U.S.A., any outstanding mortgage amount owed on the property;

(ii) second, to Andrew E. and Cynthia D. Blanche, twenty nine thousand nine hundred thirty five and 31/100 dollars ($29,935.31) as restitution for improvements and investments in the property;

(iii) third, to the United States, twenty five thousand two hundred seventy six and 20/100 dollars ($25,276.20) along with

additional interest and penalties accrued since March 1, 1996, for the unpaid tax liability of William S. Hewitt; and

(iv) fourth, any remaining excess to William S. and Peggy L. Hewitt, jointly.

It is further ORDERED that if excess proceeds from the sale of the property do not satisfy the unpaid tax liability owed to the United States by William S. Hewitt, the deficiency [*33] may be collected directly from William S. Hewitt and any other property which may be subject to liability through him.

It is further ORDERED that the remaining cross-claim by William S. Hewitt alleging conspiracy by Lomas Mortgage and Andrew E. and Cynthia D. Blanche is hereby transferred to the United States Bankruptcy Court that it may be considered in light of the pending bankruptcy proceeding of Lomas Mortgage, U.S.A.

SIGNED and ENTERED this 28 day of February 1997.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

**JUDGMENT**

In accordance with the Findings of Fact and Conclusions of Law entered by this Court on this same date, it is hereby ORDERED, ADJUDGED AND DECREED that JUDGMENT is entered herein as follows:

(a) the United States is GRANTED JUDGMENT against Defendant William S. Hewitt in the amount of twenty five thousand two hundred seventy six and 20/100 dollars ($25,276.20) along with additional interest and penalties accrued since March 1, 1996;

(b) the tax lien of the United States upon the property described in the Findings of Fact and Conclusions of Law and based upon

the amount of the JUDGMENT awarded against William S. Hewitt above is valid and [*34] may be foreclosed with proceeds to be distributed as follows:

(i) first, to Lomas Mortgage U.S.A., any outstanding mortgage amount owed on the property;

(ii) second, to Andrew E. and Cynthia D. Blanche, twenty nine thousand nine hundred thirty five and 31/100 dollars ($29,935.31) as restitution for improvements and investments in the property;

(iii) third, to the United States, twenty five thousand two hundred seventy six and 20/100 dollars ($25,276.20) along with additional interest and penalties accrued since March 1, 1996, for the unpaid tax liability of William S. Hewitt; and

(iv) fourth, any remaining excess to William S. and Peggy L. Hewitt, jointly.

It is further ORDERED, ADJUDGED AND DECREED that if excess proceeds from the sale of the property do not satisfy the unpaid tax liability owed to the United States by William S. Hewitt, the deficiency may be collected directly from William S. Hewitt and any other property which may be subject to liability through him.

It is further ORDERED, ADJUDGED AND DECREED that each party shall bear its own costs, fees and expenses.

SIGNED and ENTERED this 28th day of February 1997.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Plaintiff - Counter Defendant - Appellee,
V.
ANDREW E. BLANCHE, ET AL., Defendants,

ANDREW E. BLANCHE; CYNTHIA D. BLANCHE,
Defendants - Cross Claimants - Counter Plaintiffs - Appellants,
V.
WILLIAM S. HEWITT,
Defendant - Cross Defendant - Appellee.

No. 97-50482

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

1999 U.S. App. LEXIS 16702

**June 11, 1999, Filed**

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas, San Antonio.

Original Opinion of March 12, 1999, Reported at: 1999 U.S. App. LEXIS 4018.

JUDGES: Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

OPINIONBY: Harold R. DeMoss

OPINION: ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

Harold R. DeMoss
United States Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff - Counter Defendant - Appellee,
V.
ANDREW E. BLANCHE, ET AL., Defendants,

ANDREW E. BLANCHE; CYNTHIA D. BLANCHE,
Defendants - Cross Claimants - Counter Plaintiffs - Appellants,
V.
WILLIAM S. HEWITT,
Defendant - Cross Defendant - Appellee.

No. 97-50482

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
**July 14 1997, Filed**
(CORRECTED)

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Appeal from the United States District Court for the
Western District of Texas, San Antonio

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Before SMITH, WIENER and BENAVIDES, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of appellants for stay pending appeal is DENIED.

IT IS FURTHER ORDERED that appellants' motion for this court to fix and determine the amount of bond or other such security if any, that William S. Hewitt and Peggy L. Hewitt may be required to file or deposit in the District Court to remunerate appellants is DENIED as moot. We note the concession by the government at page 8 of its response in opposition to appellants'' motion for stay, that if this Court ultimately determines that appellants had an interest in the property senior to the federal tax lien, they may be made whole by being paid the fair market value of their interest, which concession we hold to be binding on the government as a judicial estoppel to oppose or deny payment of any such amount from the United States Treasury.

UNITED STATES OF AMERICA, Plaintiff,
VS.
ANDREW E. BLANCHE, CYNTHIA D. BLANCHE,
WILLIAM S. HEWITT, HANK WILSON, and
LOMAS MORTGAGE, U.S.A.,
Defendants.

CIVIL ACTION NO. SA-95-CA-0419

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

**June 6, 1997, FILED**

ORDER DENYING MOTION TO COMPEL
AND MOTION FOR STAY

On this date the Court considered the Defendants' [Blanches] Motion for Stay of Judgment,[1] filed May 2, 1997; and Defendants' [Blanches] Motion to Compel Deposits to the Court From the Hewitts,[2] filed April 4, 1997. After careful review the Court finds that the motions should be denied.

The court finds no reason to depart from its previous ruling that a stay of judgment should not be imposed pending appeal. Further, the Court is not persuaded that the Hewitts should be compelled to pay deposits into the registry of the Court

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1 Doc. no. 45.

2 Doc. no. 40. The motion to compel was included in the Blanches' response to the United States' response to the Blanches' motion for reconsideration and was, therefore, inadvertently never docketed as a separate motion by the Clerk. Additionally, the Court ruled on the motion for reconsideration on the day that the motion to compel was filed. Because the motion to compel was included in a reply to a motion on which the Court had already ruled, the motion to compel was overlooked by this Court.

to protect the alleged interests of the Blanches. Under the judgment of this Court, the property at issue has been held to be the property of the Hewitts. They are responsible for its maintenance. Any further payment by the Blanches is voluntary and undertaken with full knowledge of the status of the title at this time.

Accordingly, it is hereby ORDERED that the Motion to Stay and the Motion to Compel Deposits to the Court From the Hewitts is DENIED.

SIGNED this 6th day of June, 1997.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F. PROCEDURE AND ADMINISTRATION
CHAPTER 64. COLLECTION
SUBCHAPTER C. LIEN FOR TAXES
PART II. LIENS

**26 U.S.C.S. § 6323 (1999)**

§ 6323. Validity and priority against certain persons.

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

. . .

(h) Definitions. For purposes of this section and section 6324—

(1) Security interest. The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

. . .

(6) Purchaser. The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice.

In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324--

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property,

which is not a lien or security interest shall be treated as an interest in property.

(i) Special rules.

. . .

(2) Subrogation. Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

**SAN ANTONIO BOARD OF REALTORS, INC.**
9110 IH 10 N.W., PO Box 13340, San Antonio, TX 78213

# RESIDENTIAL LEASE

FOR USE WITH BROKER MANAGEMENT SERVICES & IN CONJUNCTION WITH REAL ESTATE MANAGEMENT CONTRACT (NOT SUITABLE FOR CONDOMINIUMS)

1. **PARTIES**: This agreement between WILLIAM S. HEWITT ETUX PEGGY L. HEWITT hereinafter called Owner, acting through his agent HOWARD SHELF & ASSOCIATES, REALTORS hereinafter called Broker and ANDREW E. BLANCHE, JR., ETUX CYNTHIA D. BLANCHE hereinafter called Tenant (the Parties), whereby Owner leases to Tenant and Tenant leases from Owner, the

2. **PROPERTY**: Address 3325 FOXBRIAR LANE, Lot 1, Block 1, Subdivision: NORTHCLIFFE COUNTRY CLUB ESTATES, located within the City of CIBOLO, County of GUADALUPE, State of Texas, including the following non-real estate items none listed.

3. **TERM**: For a period of ONE (1) YEAR, beginning on the 1ST day of JULY, 1990 , and ending on the 30th day of JUNE, 1991 (Primary Term). This Lease shall automatically renew on a month-to-month basis at the end of the Primary Term, unless written notice of termination is given by either of the Parties thirty (30) days or more before the termination of the Primary Term or of any extension or renewal of this Lease.

4. **RENT**: In the amount of $1000.00 per month (Rent) made payable to WILLIAM S HEWITT at 923 VANCE JACKSON #1107, SAN ANTONIO, TX 78201, in advance without demand or a grace period, on or before the 1ST day (Due Date) of each month during the Term of this Lease. Receipt is acknowledged of the pro-rated Rent in the sum of $N/A, for Rent to the first Due Date. Rent paid after Due Date is

delinquent, and Default provisions herein shall apply. At the option of the Broker, Tenant shall additionally pay (i) a late charge of $ 5.00 per day for payments received after the Due Date until Rent is paid in full (ii) $ 20.00 for each check dishonored by Tenant's bank for any reason (iii) $ N/A per day charge, payable daily, for any pet the Tenant permits on the Property without Broker's written consent. Payment of Rent shall be an independent covenant, and all monies received by Broker shall be applied first to non-Rent obligations of Tenant, then to Rent, regardless of notations on checks. At Broker's option, Broker may at anytime require that all Rent and other sums be paid in either cash, money order, or one monthly check rather than multiple checks.

5. **USE OF PROPERTY**: The Property shall be used as a single family private dwelling only, with the total number of adults and children residing therein not to exceed FOUR (4). Tenant shall not (i) sublet or assign any part of the Property (ii) repair any vehicle on the Property without permission in writing (iii) conduct any business of any type, including child care, on the Property (iv) permit more than FOUR (4) vehicles (including but not limited to automobiles, trucks, recreational vehicles, trailers, motorcycles and boats) on the Property unless authorized by Broker in writing. Non-operative vehicles shall not be stored on the Property.

6. **CLEANING CHARGE**: Tenant agrees to pay on execution of this contract a non-refundable cleaning charge of $ N/A . The charge does not relieve the Tenant of the responsibility to maintain and clean the Property as required by Broker.

7. SECURITY DEPOSIT: Tenant agrees to pay on execution of this contract a security deposit (Deposit) of $ N/A, for the faithful performance of the terms and conditions of this contract by Tenant. This Deposit shall not be construed as Rent, and any, attempt by Tenant to withhold the payment of the last month's Rent, on the grounds the Deposit serves as security for unpaid Rent, is a violation of V.T.C.A.,

Property Code § 92.108. Tenant shall not be entitled to any interest on the Deposit, and Broker is authorized to place the Deposit in an interest bearing account with interest accruing to Broker.

8. DEPOSIT DEDUCTIONS: There shall be deducted from the Deposit unpaid sums due under this lease (i) Rent including late charges (ii) utilities (iii) cleaning, damages and required repairs to the Property or its contents beyond reasonable wear and tear (iv) replacing unreturned keys and/or change of locks (v) cost of removing unauthorized locks (vi) removing, storing Abandoned property (vii) removing Abandoned or illegally parked vehicles (viii) cost of pest control if required by Broker (ix) other charges provided for herein or agreed to by the Parties. Any balance of the Deposit shall be refunded to Tenant by mail within thirty (30) days of the date Tenant surrenders the Property and keys and delivers Tenant's forwarding address to Broker in writing in accordance with state law. Broker shall provide Tenant a written report of any deductions. If deductions exceed the Deposit, Tenant agrees to pay Broker the amount due within ten (10) days of notice to Tenant by Broker.

9. NOTICE REQUIRED: Tenant agrees to give Broker written notice of intent to vacate the Property at least thirty (30) days prior to the expiration of the Term of this Lease or any extension thereof. Failure to do so shall entitle Broker to retain the entire amount of the Deposit provided by state law.

10. HOLDING OVER: If Tenant fails to vacate the Property at the end of the Term, or on an agreed move out date, Tenant shall (i) pay Rent for the holdover period at a rate of $ nothing listed per day to be due and payable daily at the Broker's designated address (ii) indemnify Broker and Owner, prospective tenants or purchasers, for damages, including lost Rents, profits from lost sale, lodging expenses and attorney's fees.

11. ABANDONMENT: If Tenant (i) is absent from the Property for five (5) consecutive days while in Default of this agreement (ii) has been evicted by judicial process (iii) leaves personal property after the termination of the Lease, the Property and its contents may be deemed by Broker to be abandoned (Abandoned). Broker or his agents may peaceably enter the Property and remove its contents in accordance with V.T.C.A. Property Code § 54.044. Further, Broker or his agents are authorized to collect a charge for packing, removing, storage and sale costs of the personal property that has been removed from the Property and are authorized to sell or otherwise dispose of the personal property so removed in accordance with V.T.C.A Property Code § 54.045.

12. LIEN: A contractual lien to secure payment of unpaid Rent that is due is hereby granted Broker on all personal property of Tenant, except that property which is exempted by V.T.C.A. Property Code § 54.042. Broker or his agents are authorized to seize such property if same can be accomplished without a breach of the peace. Further, Broker or his agents are authorized to collect a charge for packing, removing, storage and sale costs of any property seized, and are authorized to sell or dispose of the property seized in accordance with V.T.C.A. § 54.045.

13. RENT ACCELERATION: In the event the Tenant, prior to the end of the Term of this Lease, or any extension or renewal thereof, (i) Abandons the Property, or (ii) gives Owner written or oral notice of intent to move prior to the end of the Lease Term, or (iii) is judicially evicted, thereupon all remaining monthly Rent for the full Term of this Lease shall be accelerated automatically without notice, and shall immediately become due and payable.

14. DEFAULT: If Tenant shall default in the prompt payment of the Rent or any other sums due hereunder, Abandons the Property, fails to occupy the Property within five (5) days of the beginning date of this Lease, or violates any of the Terms

of this Lease, all future Rent shall be accelerated and become immediately due and payable. and Broker at his option may terminate Tenant's right of occupancy by giving Tenant a three (3) day written notice to vacate, delivered either in person or by first class mail, and shall have the right to file a Forcible Entry and Detainer suit in the proper court for possession. After giving such notice, or filing suit for possession. Broker may accept payment for sums due hereunder without waiving or diminishing Broker's right to proceed against Tenant for eviction, property damages, past or future Rent, or other sums due hereunder, Broker may report any unpaid sums due hereunder, breaches of this Lease or property damages, to credit reporting agencies for addition to Tenant's credit files.

15. RESPONSIBILITY FOR PROPERTY CONDITIONS: Tenant accepts the Property in its present condition subject to any conditions discovered which could materially affect the health and safety of ordinary persons. No implied warranties have been made by Broker or his agents regarding the condition of the Property and no agreements have been made regarding future repairs unless specified in this Lease. Broker has provided locks and smoke detector(s) required by law. Any additional locks or smoke detectors desired by Tenant may be installed at Tenant's expense only after written approval of Broker. When installed, any additional items shall become the property of the Owner.

Tenant shall use reasonable diligence in the care of the Property and shall be responsible for (i) any cost of correcting sewer stoppage caused by his use (ii) supplying and changing heating and air conditioning filters at monthly intervals (iii) supplying and replacing light bulbs and smoke detector batteries (iv) maintaining the yard including the shrubbery (v) prompt removal of trash from the Property and any alley (vi) eliminating any conditions that may be dangerous to health and safety (vii) damages to doors, windows, screens or other items not caused by negligence of

Broker/Owner (viii) cost of pest control except for wood-destroying insects (ix) taking precautions to preclude broken water pipes due to freezing (x) lost or misplaced keys (xi) damages resulting from Tenant's failure to promptly notify Broker of needed repairs (xii) maintenance of the following in good working order at Tenant's expense: SEE EXHIBIT 1.

Tenant shall NOT (i) make any repairs or alterations to the Property without written permission of Broker (ii) remove any part of the Property for any purpose (iii) remove, change or re-key any lock without permission of Broker (iv) make holes in the woodwork, floors or walls except that a reasonable number of small nails may be used to hang pictures in sheetrock walls and grooves of paneling (v) permit any water furniture in the Property without written permission of Broker (vi) install new or additional telephone or cable outlets without written permission of Broker (vii) paint, refinish, or redecorate any part of the Property without written permission of Broker.

At the termination of this Lease, Tenant agrees to surrender the Property in the same condition as when received, reasonable wear and tear excepted.

16. OWNERS RESPONSIBILITY FOR REPAIRS: All requests by tenant for repairs to be made by owner must be directed to Broker in writing except those caused by fire, interruption of utilities or such other emergency. Broker shall have the right to temporarily discontinue utilities and the use of any fixtures or appliances by the Tenant in order to perform repairs or maintenance or to avoid damage to the Property. Broker shall act with due diligence but shall not be obligated to make repairs on other than a business day except in the event of an emergency. No deductions shall be allowed in the Rent during reasonable periods of repair to the Property and the Lease shall remain in full force. If, in the opinion of the Broker, the property is substantially damaged by fire or other disaster, the Broker may terminate this Lease upon

reasonable notice to Tenant. The Rent, in this event, shall be pro-rated to the date of termination and deposits refunded unless lawful deduction.

17. UTILITIES: Unless otherwise specified herein, all charges and deposits for utilities will be paid by Tenant. Owners agrees to pay for the following utilities: NONE.

18. LIABILITY: Owner or Owner's agents shall not be liable to Tenant, his guests, invitees or other occupants. for any damages, injuries, or losses to person or property caused by fire, flood, water leaks, ice, snow, hail. winds, explosion, smoke, interruption of utilities, theft, burglary, robbery, assault, vandalism, other persons, condition of the Property, or other occurrences unless such damage or injury is caused by the gross negligence of Owner or his agents. Tenant agrees to notify Broker immediately of any dangerous or potentially dangerous conditions on or about the Property. Broker recommends that Tenant secure insurance coverage for protection against such liabilities and losses.

19. MILITARY: If Tenant is or becomes a member of the Armed Forces on extended active duty and receives permanent change of station (PCS) orders to leave the County wherein thc Property is located, or is relieved from active duty, then Tenant may terminate this Lease upon giving thirty (30) days written notice and attaching a certified copy of the military orders. Orders permitting base housing do not constitute grounds for termination.

20. POSSESSION: This Lease is conditioned upon Broker being able to secure possession of the Property, and if Broker is unable to deliver possession of the Property on the agreed date for any reason, Tenant's right of possession shall be delayed for not more than 30 days, after which the Lease shall be null and void without liability on the part of the Owner and/or Broker and any Security Deposit will be promptly refunded. If Tenant's possession is delayed within

the allowable period, the Primary Term dates will be changed accordingly.

21. RELATED DOCUMENTS: Incorporated into this Lease are the following documents (if checked): ☒ Move-In-Rental Inspection. All Tenant's statements in the Tenant's Rental Application are material representations relied upon by Broker. Any misrepresentations shall constitute a breach of this Lease and Broker may terminate this Lease,

22. INSPECTION: Owner, Broker, their agents or other persons specifically authorized by either of them, may enter the Property by reasonable means at reasonable times without notice, to (i) inspect the Property (ii) make repairs (iii) show the Property to prospective tenants or purchasers (iv) exercise a contractual lien.

23. PETS: Tenant shall not permit any pet on the Property, even temporarily, unless otherwise agreed to by Broker in writing.

24. NUISANCE: The conduct of Tenant, members of their family, guests, invitees, or other occupants shall not be unlawful, disorderly or boisterous or in any manner create a nuisance, and shall not disturb the rights of others near the Property. If provided, Broker's written Rules and Regulations are hereby made a part of this Lease, and violation of the Rules and Regulations by Tenant or other occupants of the Property shall be deemed a violation of this Lease.

25. ATTORNEY'S FEES: The Owner's agent and/or any signatory to this lease agreement who is the prevailing party in any legal proceeding against any other signatory brought under or with relation to this Lease or this transaction shall be additionally entitled to recover court costs, reasonable attorney fees, and all other out-of-pocket costs of litigation, including depositions, travel and witness costs, from the nonprevailing party.

26. NOTICE TO TENANT: In the event Tenant buys the Property, Broker advises Tenant (Buyer), as required by law, that Buyer should have the Abstract covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If the Property is situated in a Utility District, Section 50.301 Texas Water Code requires the Buyer to sign and acknowledge the statutory notice from Seller relating to the tax rate and bonded indebtedness of the District.

27. **SPECIAL PROVISIONS:**
Tenant shall have the right and option prior to default to purchase the property on the terms and conditions set out on the Earnest Money Contract attached hereto as Attachment "A" on or before June 30, 1991. Such option shall be exercised by the delivery by Tenant to the Title Company named in Attachment "A" of a copy of Attachment "A" signed by the Tenants and setting a closing date on or before June 30,1991.

28. SAVING CLAUSE: Should any clause of this instrument be found invalid by a court of law, the remainder of this instrument shall not be affected thereby, and all other provisions of this instrument shall remain valid and enforceable to the fullest extent permitted by law.

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE. THIS PROPERTY IS OFFERED WITHOUT RESPECT TO RACE, COLOR, CREED, SEX OR NATIONAL ORIGIN. The Parties hereto agree that this Lease contains all the agreements between them, that no oral agreements have been made and this agreement may be altered only by an agreement in writing signed by all Parties hereto. Tenant acknowledges receipt of a copy of this Lease and all Related Documents.

Executed in multiple originals this the 20TH day of MAY, 1990.

HOWARD SHELF & ASSOCIATES, REALTORS
BROKER

By */s/ William S. Hewitt /s/ Peggy L. Hewitt*
WILLIAM S. HEWITT/PEGGY L. HEWITT

508 Pat Booker Road UC, TX 78148
Designated address for Broker's notices

*/s/Andrew E. Blanche, Jr.*
Tenant: ANDREW E. BLANCHE, JR.

*/s/ Cynthia D. Blanche*
Tenant: CYNTHIA D. BLANCHE

3325 Foxbriar Lane, Cibolo, Tx 78108
Address for Tenant's notices.

NOTE: This form has been prepared by legal counsel for the San Antonio Board of Realtors, Inc. (SABOR). Said attorneys, who are licensed by the State of Texas, have approved this Win for use by SABOR members in the "a of transaction described in the title hereof. This form has not been drafted for a specific transaction.

SABOR Form 402 - Revised 12-10-85 (PREVIOUS EDITIONS ARE OBSOLETE)

[Residential Lease]
**Exhibit "1"**

3325 FOXBRIAR LANE
LEASE OPTION

Price .....$139,500.00

Option Money: 1 July 1990.....$2,500.00
1 Jan 1991 .....$1,500.00

Period of Option.....Eff 1 July 1990
Expires .....30 Jun 1991

Lease Payment.....$1,000.00 per month

CREDIT BACK TO PURCHASE OF $250.00 PER MONTH CREDIT FOR TERM OF OPTION.

HOME WILL BE INSPECTED BY A CERTIFIED REAL ESTATE INSPECTOR PRIOR TO PURCHASER TAKING POSSESSION. INSPECTION WILL BE PAID FOR BY PURCHASER. ALL REPAIRS WILL BE ACCOMPLISHED BY THE SELLER AND/OR HIS DESIGNATED REPRESENTATIVE. SELLER WARRANTS THE ROOF UNTIL JUNE 6, 1991.

AFTER THE REPAIRS HAVE BEEN COMPLETED TO THE SATISFACTION OF THE PURCHASER, ALL FUTURE REPAIRS WILL BE AT THE EXPENSE OF THE PURCHASER.

HOWARD SHELF AND ASSOCIATES, REALTORS WILL RECEIVE A COMMISSION OF 6% OF THE SALE PRICE UPON CLOSING OF THE SALE. SUCH COMMISSION TO BE EARNED AND PAID AS FOLLOWS: $500.00 ON 1 JULY 1990 AND $500.00 ON 1 JAN 1991; THE BALANCE OF THE COMMISSION WILL BE DUE AND PAYABLE ON CLOSING.

THE OPTION MONEY IS EARNED UPON RECEIPT AND WILL BE CREDITED TO PURCHASER UPON EXECUTION OF THE CONTRACT.

[Residential Lease]
**ATCH [Attachment] "A"**

**SAN ANTONIO BOARD OF REALTORS, INC.**
9110 IH 10 N.W., PO Box 13340, San Antonio, TX 78213

**ONE TO FOUR FAMILY RESIDENTIAL EARNEST MONEY CONTRACT (RESALE) ALL CASH, ASSUMPTION, THIRD PARTY CONVENTIONAL OR OWNER FINANCED**[1]
(PROMULGATED BY TEXAS REAL ESTATE COMMISSION)

1. PARTIES: WILLIAM S. HEWITT ETUX PEGGY L. HEWITT (Seller) agrees to sell and convey to ANDREW E. BLANCHE, JR., ETUX CYNTHIA D. BLANCHE (Buyer) and Buyer agrees to buy from seller the property described below.

2. PROPERTY: Lot 1, Block 1, NORTHCLIFF COUNTRY CLUB ESTATES Addition, City of CIBOLO, GUADALUPE County, Texas, known as 3325 FOXBRIAR LANE (Address); or as described on attached exhibit, together with the following items, if any: curtains and rods, draperies and rods, valances, blinds, window shades. screens, shutters, awnings, wall-to-wall carpeting, mirrors fixed in place, ceiling fans, attic fans, mail boxes, television antennas, permanently installed heating and air conditioning units and equipment, built-in security and fire detection equipment. lighting and plumbing fixtures, water softener, trash compactor, garage door openers with controls, shrubbery and all other property owned by Seller and attached to the above described real property. All property sold by this contract is called the "Property".

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[1] Some paragraphs of form are "fill-in" so only paragraphs with completed items are included for paragraphs 1 through 14. The general and special provisions in paragraphs 15 through 22 are included in their entirety.

3. CONTRACT SALES PRICE:
   A. Cash payable at closing .....$ 13,590.00
   B. Sum of all financing described in Paragraph 4 below .....$ 125,550.00
   C. Sales Price (Sum of A and B) .....$ 139,500.00

4. FINANCING: (Check applicable boxes below)
   C. THIRD PARTY FINANCED:
   A third party first lien note of $125,550.00, due in full in 15 year(s), payable in initial monthly payments of principal and interest not exceeding $1,348.63 for the first 15 year(s) of the loan.

   NOTICE TO PARTIES: Before signing this contract Buyer is advised to determine the financing options from lenders. Certain loans have variable rates of interest, some have monthly payments which may not be sufficient to pay the accruing interest, and some have interest rate "buydowns" which reduce the rate of interest for part or all of the loan term at the expense of one or more of the panics to the contract.

5. EARNEST MONEY: $ 100.00 is herewith tendered by Buyer and is to be deposited as Earnest Money with COMMERCIAL TITLE COMPANY at 1001 PAT BOOKER RD, UC, TX (Address), as Escrow Agent, upon execution of the contract by both parties.

6. TITLE: Seller shall furnish to Buyer at Seller's expense either:
   A. Owner's Policy of Title Insurance (the title Policy) issued by COMMERCIAL TITLE COMPANY in the amount of the Sales Price and dated at or after closing
   NOTICE TO SELLER AND BUYER: AS REQUIRED BY LAW, Broker advises Buyer that buyer should have an Abstract covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is to be obtained,

Buyer should obtain a Commitment for Title Insurance (the Commitment) which should be examined by an attorney of Buyer's choice at or prior to closing. If the Property is situated in a Utility District, Section 50.301 Texas Water Code requires the Buyer to sign and acknowledge the statutory notice from Seller relating to the tax rate and bonded indebtedness.

7. PROPERTY CONDITION

On Seller's receipt of all loan approvals and inspection reports, Seller shall commence repairs and termite treatment required of Seller by the contract, any lender and the Property Condition Addendum, if any, and complete such repairs prior to closing. Seller's responsibility for the repairs, termite treatment and repairs to the termite damage shall not exceed $1,500.00. If Seller fails to complete such repairs, Buyer may do so and Seller shall be liable up to the amount specified and the same paid from the proceeds of the sale. If the repair costs will exceed the stated amount and Seller refuses to pay such excess, Buyer may (1) pay the additional cost or (2) accept the Property with the limited repairs unless such repairs are required by lender or (3) Buyer may terminate this contract and the Earnest Money shall be refunded to Buyer. Buyer shall make his election within three (3) days after Seller notifies Buyer of Seller's refusal to pay such excess. Failure of buyer to make such election within the time provided shall be deemed to be Buyer's election to accept the Property with the limited repairs, and the sale shall be closed as scheduled; however, if lender required repairs prohibit Buyer's acceptance with limited repairs, this contract shall terminate and Earnest money shall be refunded to Buyer.

If the repair costs will exceed five (5) percent of the Sales Price of the Property and Seller agrees to pay the cost of such repairs, Buyer shall have the option of closing the sale with the completed repairs, or terminating the sale and the Earnest Money shall be refunded to Buyer. Buyer shall make this

election within three (3) days after Seller notifies Buyer of Seller's willingness to pay the cost of such repairs that exceed (5) percent of the Sales Price. Failure of Buyer to make such election within the time provided shall be deemed to by Buyer's election to close the sale with the completed repairs.

Broker(s) and sales associates have no responsibility or liability for inspections or repairs made pursuant to this contract.

8. BROKER'S FEE: HOWARD SHELF & ASSOCIATES, REALTORS, Listing Broker, and any Co-Broker represent Seller unless otherwise specified herein. Seller agrees to pay Listing Broker the fee specified by separate agreement between Listing Broker and Seller. Escrow Agent is authorized and directed to pay Listing broker said fee from the sale proceeds.

9. CLOSING: The closing of the sale shall be on or before 31 AUGUST, 1991, or within seven (7) days after objections to title have been cured, whichever date is later (the Closing Date); however, if financing or assumption approval has been obtained pursuant to Paragraph 4, the Closing Date shall be extended daily up to fifteen (15) days if necessary to complete loan requirements. If either party fails to close this sale by the Closing date, the non-defaulting party shall be entitled to exercise the remedies contained in Paragraph 16 immediately and without notice.

10. POSSESSION: The possession of Property shall be delivered to Buyer on SEE PARA 11 in its present or required improved condition, ordinary wear and tear excepted. Any possession by Buyer prior to or Seller after closing that is not authorized by the Buyer's Temporary Residential lease or Seller's Temporary Residential Lease Forms promulgated by the Texas Real Estate Commission shall establish a landlord-tenant at sufferance relationship between the parties.

11. **SPECIAL PROVISIONS**: (Insert factual statements and business details applicable to this sale.)

SEE LEASE OPTION TERMS IN EXHIBIT 1.

SELLER WILL FURNISH BUYERS WITH AN AMERICAN HOME SHIELD PREMIER PROTECTION HOME WARRANTY PLAN NOT TO EXCEED $355.00.

12. SALES EXPENSES TO BE PAID IN CASH AT OR PRIOR TO CLOSING:

A. Loan appraisal fee shall be paid by BUYER AT TIME OF APPLICATION.

B. The total of the loan discount and any buydown fees shall not exceed $3,766.50 of which Buyer shall pay the first $-0- and Seller shall pay the remainder.

C. Seller's Expenses: Prepayment penalties on any existing loans paid at closing, plus cost of releasing such loans and recording releases; tax statements; ½ of any escrow fee; preparation of deed; preparation and recording of any deed of trust to secure assumption; any Texas Veterans' Housing Assistance Program Participation Fee; other expenses stipulated to be paid by Seller under ~~other~~ provisions of this contract.

D. Buyer's Expense: Application, origination and commitment fees; private mortgage insurance premiums and any loan assumption fee; expenses incident to new loan(s); ½ of any escrow fee; any required premiums for flood and hazard insurance; any required reserve deposits for insurance premiums, ad valorem taxes and special governmental assessments; interest on all monthly installment payment notes from date of disbursements to one (1) month prior to dates of first monthly payments; expenses stipulated to be paid by Buyer under other provision of this contract and any customary Texas Veterans' Housing Assistance Program Loan costs for buyer.

E. If any sales expenses exceed the maximum amount herein stipulated to be paid by either party, either party may terming this contract unless the other parity agrees to pay such excess.

13. PRORATIONS: Taxes, flood and hazard insurance (at Buyer's option), rents, maintenance fees, interest on any assumed loan and any prepaid unearned mortgage insurance premium which has not been financed as part of any assumed loan and which is refundable in whole or in part at a later date shall be prorated through the Closing date. If Buyer elects to continue Seller's insurance policy, it shall be transferred at closing.

14. TITLE APPROVAL:

B. if Title Policy is furnished, the Title Policy shall guarantee Buyer's title to be good and indefeasible subject only to (1) restrictive covenants affecting the Property (2) any discrepancies, conflicts or shortages in area or boundary lines, or any encroachments, or any overlapping of improvements (3) taxes of the current and subsequent years and subsequent assessments for prior years due to a change in land usage or ownership (4) existing building and zoning ordinances (5) rights of parties in possession (6) liens created or assumed as security for the sale consideration (7) utility easements common to the platted subdivision of which this Property is a part and (8) reservations or other exceptions permitted by the terms of this contract. Exceptions permitted in the Deed and zoning ordinances shall not be valid objections to title. If the Title Policy will be subject to exceptions other than those recited above in sub-paragraphs (1) through (7) inclusive, Seller shall deliver to Buyer the Commitment and legible copies of any documents creating such exceptions that are not recited in sub-paragraphs (1) through (7) above at least five (5) days prior to closing. If Buyer ahs objection to any such previously undisclosed exceptions, Buyer shall have five (5) days after receipt of such commitment and copies to make written objections to Seller. If no Title commitment is provided to Buyer at or

prior to closing, it will be conclusively presumed that Seller represented at closing that the Title Policy would not be subject to exceptions other than those recited above in sub-paragraphs (1) through (7).

C. In either instance if title objections are raised, Seller shall have fifteen (15) days from the date of such objections are disclosed to cure the same, and the Closing Date shall be extended accordingly. If the objections are not satisfied by the extended closing date, this contract shall terminate and the Earnest Money shall be refunded to Buyer, unless buyer elects to waive the unsatisfied objections and complete the purchase.

D. Seller shall furnish tax statements showing no delinquent taxes, a supplemental Abstract when applicable, showing no additional title exceptions and a General Warranty Deed conveying title subject only to liens securing payment of debt created or assumed as part of the consideration, taxes for the current year, restrictive covenants and utility easements common to the platted subdivision of which the Property is a part and reservations and conditions permitted by this contract or otherwise acceptable to Buyer. Each note shall be secured by vendor's and deed of trust liens. A vendor's lien and deed of trust to secure any assumption shall be required which shall automatically be released on execution and deliver of a release by noteholder. If Seller is released from liability on any assumed note, the vendor's lien and deed of trust to secure assumption shall not be required. In case of dispute as to the form of the Deed, note(s), deed of trust or deed of trust to secure assumption, forms prepared by the State Bar of Texas shall be used.

15. CASUALTY LOSS: If any part of Property is damaged or destroyed by fire or other casualty loss, Seller shall restore the same to its previous condition as soon as reasonably possible, but in any event by closing Date. If Seller is unable

to do so without fault, Buyer may terminate this contract and the Earnest Money shall be refunded to Buyer.

16. DEFAULT: If Buyer fails to comply herewith, Seller may either (a) enforce specific performance and seek such other relief as may be provided by law or (b) terminate this contract and receive the Earnest Money as liquidated damages. If Seller is unable without fault, within the time therein required to (a) make any non-casualty repairs or (b) deliver the Commitment or (c) deliver the Complete Abstract, Buyer may either terminate this contract and receive the Earnest Money as the sole remedy or extend the time for performance up t fifteen (15) days and the Closing Date shall be extended pursuant to other provisions of this contract. If Seller fails to comply herewith for any other reason, Buyer may either (a) enforce specific performance hereof and seek such other relief as may be provided by law or (b) terminate this contract and receive the Earnest Money, thereby releasing Seller from this contract.

17. ATTORNEY'S FEES: Any signatory to this contract, Broker or Escrow Agent who is the prevailing party in any legal proceeding brought under or with relation to this contract or transaction shall be additionally entitled to recover court costs and reasonable attorney fees from the non-prevailing party.

18. ESCROW: The Earnest Money is deposited with Escrow Agent with the understanding that Escrow Agent (a) is not a party to this contract and does not assume or have any liability for performance or non-performance of any signatory (b) has the right to require from all signatories a written release of liability of the Escrow Agent which authorizes the disbursement of the Earnest Money (c) is not liable for interest or other charge on the funds held and (d) is not liable for any losses of escrow funds caused by the failure of any banking institution in which such funds have been deposited, unless such banking institution is acting as Escrow Agent. If any signatory unreasonably fails to deliver promptly the

documents described in (b) above, then such signatory shall be liable to the other signatories as provided in Paragraph 17. At closing, the Earnest Money shall be applied first to any cash down payment required, then to Buyer's closing costs and any excess refunded to Buyer. Any refund or payment of the Earnest Money under this contract shall be reduced by the amount of any actual expenses incurred on behalf of the party receiving the Earnest Money, and Escrow Agent will pay the same to the creditors entitled thereto.

19. REPRESENTATIONS: Seller represents that as of the Closing Date (a) there will be no unrecorded liens, assessments or Uniform Commercial Code Security Interests against any of the Property which will not be satisfied out of the Sales Price, unless securing payment of any loans assumed by Buyer and (b) assumed loan(s) will be without default. If any representation in this contract is untrue on the Closing Date, this contract may be terminated by Buyer and the Earnest Money shall be refunded to Buyer. All representations contained in this contract shall survive closing.

20. AGREEMENT OF PARTIES: This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Texas Real Estate Commission promulgated addenda which are a part of this contract are (list): - EXHIBIT 1 (LEASE. OPTION TERMS); EXHIBIT 2 (PROPERTY CONDITION ADDENDUM; RESIDENTIAL LEASE DATED MAY 20, 1990)

21. NOTICES: All notices shall be in writing and effective when delivered at the addresses shown below.

22. CONSULT YOUR ATTORNEY: The Broker cannot give you legal advice. This is intended to be a legally binding contract. READ IT CAREFULLY. Federal law may impose certain duties upon Brokers or Signatories to this contract when any of the signatories is a foreign party, or when any of

the signatories receives certain amounts of U.S. currency in connection with a real estate closing. If you do not understand the effect of any part of this contract, consult your attorney BEFORE signing.

Seller's Attorney: RONALD R. FLAKE
Buyer's Attorney: _____

EXECUTED in multi-originals effective the __day of __, 19___.
(BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)

*/S/ Andrew E. Blanche, Jr.*
Buyer: ANDREW E. BLANCHE, JR.

*/S/ Cynthia D. Blanche*
Buyer: CYNTHIA D. BLANCHE.

3522 FOXBRIAR LANE, CIBOLO, TX 78108
Buyer's Address (512) 620-0334 Phone No.

*/S/ William S. Hewitt*
Seller: WILLIAM S. HEWITT

*/S/ Peggy L. Hewitt*
Seller: PEGGY L. HEWITT

923 Vance Jackson #1107, Sa, Tx 78201
Seller's Address (512) 733-0343 Phone NO.

HOWARD SHELF & ASSOCIATES, REALTORS
Listing Broker License No. 187931-0

By: */s/ Howard L. Shelf*

518 Pat Booker Road, Universal City, TX 78201
Listing Broker's Address (512)659-5501 Phone No.

## EARNEST MONEY RECEIPT

Receipt of $100.00 Earnest Money is acknowledged in the form of personal check.

Escrow Agent: COMMERCIAL TITLE
By *__/s/ K. B. 659-1381__*

Date: June 22, 1990

The form of this contract has been approved by the 'Texas Real Estate Commission. Such approval relates to this contract form only. No representation is made as to the legal validity or adequacy of any provision in any specific transaction. It is not suitable for complex transactions. Extensive riders or additions are not to be used. (02-85) TREC NO. 20-0. This form replaces TREC NOS. 1- 1, 4-0 and 6-0.

UNITED STATES OF AMERICA, Plaintiff,
VS.
ANDREW E. BLANCHE, CYNTHIA D. BLANCHE,
WILLIAM S. HEWITT, HANK WILSON, and
LOMAS MORTGAGE, U.S.A.,
Defendants.

CIVIL ACTION NO. SA-95-CA-0419

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

**April 4, 1997, FILED**

**ORDER DENYING MOTION TO RECONSIDER AND LIFTING STAY OF EXECUTION**

On this date the Court examined the Defendants Blanches' Motion for Reconsideration or in the Alternative for New Trial, filed March 19, 1997; United States of America's Response, filed March 28, 1997; and United States of America's Motion to Set Aside Order Granting Defendants Blanches' Motion for Stay of Execution or other Proceedings for Enforcement, filed March 27, 1997.

Having carefully considered the record and the arguments of counsel, the Court finds that the Motion to Reconsider should be denied. The stay pending determination of the motion to reconsider shall therefore be lifted.

Accordingly, it is hereby ORDERED that the Defendants Blanches' Motion for Reconsideration or in the Alternative for New Trial is DENIED.

It is further ORDERED that the United States of America's Motion to Set Aside order Granting Defendants Blanches' Motion for Stay of Execution or Other Proceedings for Enforcement is GRANTED such that the stay entered by this Court on March 19, 1997, is SET ASIDE.

SIGNED this 4th day of April, 1997.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE